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THE LAW OF MINES AND MINERALS.

The Law

OF

MINES AND MINERALS,

WITH AN

APPENDIX OF MINING PRECEDENTS,

FULLY ANNOTATED WITH REFERENCES TO THE TEXT.

AND

A Glossary of English Mining Terms,

BY THE LATE

WILLIAM BAINBRIDGE, F.G.S.,

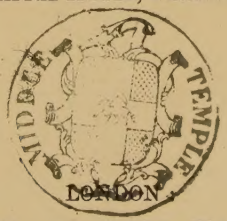
OF THE INNER TEMPLE, BARRISTER-AT-LAW.

The Fifth Edition

BY

ARCHIBALD BROWN,

OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW.



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PREFACE TO THE FIFTH EDITION.

"BAINBRIDGE ON MINES" was the pioneer book on the Law of Mines; and the learned author (long since deceased) undoubtedly produced a book, which, at the date of its first publication, was very acceptable both to the Legal Profession and to the Mining World. But a pioneer treatise no longer suffices, when the subject matter has developed as the Law of Mines has done; and even the Fourth Edition (edited by me), which was published in January, 1878, has long ceased to suffice; and under these circumstances, a new edition has been long wanted.

In this Fifth Edition, I have preserved all that was good in the old "Bainbridge," reducing it in compass and otherwise modifying it as required; and I have also maintained, in all material particulars, the arrangement and the method of treatment adopted by me in the Fourth Edition. But I have also added greatly to the treatise as regards the subject matters (of a civil character) comprised in it; and every new decision upon these subject matters, and also every new statute bearing upon the law of mines (civil and criminal or regulative) has, I believe, been duly noted, and also adequately considered. The authorities themselves, also, have been re-perused, and their effect (in the great majority of cases) has been re-stated,—both more concisely and

more practically. And generally, I have embodied in this Edition the results of my own long experience; and have endeavoured also, in my treatment of the subject, to write in a manner which shall be equally acceptable to the legal practitioner and to the practical miner.

The Mining Precedents comprised in the Appendix have been revised; and in the margins thereof, I have added references to the relevant portions of the text; and the old "Glossary of English Mining Terms," as being still likely to prove useful, has been retained.

The Table of Contents presents, under each chapter, a summary (methodically arranged) of the contents of that chapter; and the Index at the end of the volume has been constructed with a paramount view to the convenience of practitioners consulting the treatise; and in the Table of Cases, the dates (together with the various reports) have been added; and, in fact, the dates have been consistently added throughout the treatise.

A. BROWN.

8, New Square,
Lincoln's Inn, W.C.
Dec. 1899.

THE AUTHOR'S PREFACE

TO THE THIRD EDITION—(ABRIDGED).

IT may justly excite surprise that, before the first publication of this Work, there should have been no attempt to examine and discuss the important and interesting questions which have arisen on the subject of Mines, and to reduce them to the form of a regular Treatise. The subject had, indeed, received so little attention, that there hardly existed any epitome of the law respecting it in the general and elaborate books of legal reference; yet there was no country which more demanded this research. In other countries, the prerogative of the State had asserted the general right to the Mines, and the ruling power was thus enabled to propound useful and comprehensive codes of law for their development and pursuit, with reference not only to the lands in which the minerals were found, but also to the rights exacted from neighbouring proprietors. In this country the right of the Crown was limited to mines of gold and silver. Several local customs had indeed established some extensive privileges in favour of miners, and appear to sanction some larger original royal rights. But in modern times the mines of the realm have belonged to private owners, whose powers, however absolute in other respects, have been strictly confined within their own domain. This right of proprietorship, subject to all the abstruse and complicated laws of devolution and enjoyment incident to real property, and the great division of lands among numerous

owners, have produced many corresponding impediments to the prosecution of mining, and have brought the miner into constant collision with the recognized rights of others. It is, therefore, not to be wondered that the searches of the author should have sometimes resembled, both in their character and result, the occupations of which he designed to treat, and that, like the miner, he was compelled to traverse the labyrinths of darkness before emerging to the light of day. It might be expected that a subject, which has experienced in actual practice a rapid and comparatively recent extension, should not stand settled by express decision with respect to many important topics. The strict conclusion of law, therefore, must often be arrived at, after a process not only of research but of reflection.

NEWCASTLE-UPON-TYNE,
July, 1867.

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ADDENDA.

*** **The following Addenda are noted in the Index, and also in the Table of Cases and of Statutes, by the addition of the abbreviation "*add.*":**

Page 2, footnote (*l*), } *Add* a reference to *Johnstone* v. *Crompton*, [1899]
4, footnote (*r*), } 2 Ch. 190.

18, after the words, "*in a more advantageous way*," in line 26 from top, add the following: In *In re Maynard's Settled Estate*, [1899] 2 Ch. 347, where there were comprised in the settlement two adjoining properties, which (with the mines thereunder) were separated from each other by a narrow strip of land running from east to west, and which strip of land (with the mines thereunder) belonged to a third person; and the mines to the north of the dividing strip of land had been leased by the settlor, and also worked by his lessees, but the mines to the south of the dividing strip had not been either leased or worked, —the court held, that these latter mines (although the seams were the same) were distinct mines,—equally as if they had been situate in different counties or parishes,—and accordingly, the getting of them was not a "*pursuing* of the old seams or veins."

41, in footnote (*p*), *add* a reference to *Re Lord Gerard and London and North-Western Rail. Co.*, [1895] 1 Q. B. 459.

45, in footnote (*o*), *add* a reference to *Att.-Gen.* v. *Tomline* (1877), 5 Ch. D. 750.

80, in footnote (*l*), *add* a reference to *Aldis* v. *London* (*Corporation*), [1899] 2 Ch. 169.

83, in footnote (*n*), *add* a reference to *R.* v. *London and North-Western Rail. Co.*, [1894] 2 Q. B. 512.

85, after the words (in line 22 from top), "artificial continuance of," *add* the following:—But as regards such water, when it has been long stagnant, *and houses have been built on the faith of its continuance*, a different decision is now possible (see *Littledale* v. *Lonsdale* (1791), 2 H. Bl. 267, cited in *Jordeson's Case*, [1899] 2 Ch. 217).

88, in footnote (*k*), *add* a reference to *Consett Waterworks* v. *Ritson* (1889), 22 Q. B. D. 318.

99, *add* (at foot of page) the following: In *R.* v. *London and North-Western Rail. Co.*, [1899] 1 Q. B. 921, where, under the Acts (1833) incorporating a local railway company, and authorising the purchase of lands for the railway, the mines under (and within a distance of 40 yards from) the railway were only to be worked on notice first given to the railway company, and the company might thereafter purchase the mines at a price to be settled by the verdict of a jury; and (failing such purchase by the company) the mine-owners were to be at liberty to work, without being liable for any damage; and it appeared, that the defendant company (in 1846) had (under their special Act) purchased up the local company's line, and also certain other local lines,—the special Act repealing the prior Acts,—"*except as regards acts done, rights acquired, etc.*," and incorporating (for the future) the provisions of the Railways Clauses Consolidation Act, 1845, and the Lands Clauses Consolidation Act, 1845; and in the year 1894, the mine-owner gave notice to the defendant company of his intention

to work the mines, and the defendant company gave him a counter-notice of their willingness to purchase part of the mines; and upon an arbitration under the Lands Clauses Consolidation Act, 1845,—which arbitration the defendant company attended under protest,—the amount of the compensation payable was ascertained, according to the provisions of the Railways Clauses Consolidation Act, 1845; but the defendant company contended that the compensation should have been ascertained according to the provisions of the original Acts of 1833, the original purchase having been made under those Acts,—the Court said, that the company could not, on the ground of that contention, refuse to take up the award; and that the proper course for the company to have adopted was to have procured the arbitrator to state a special case raising this contention; but COLLINS, L.J., was of a contrary opinion, considering that the decision in *North-Eastern Rail. Co.* v. *Crossland* (1863), 32 L. J. Ch. 353, was in point, *the subsequent legislation not affecting rights acquired under the* 1833 *Acts.*

Page 100, in footnote (*v*), *add* a reference to *Canadian Pacific Rail. Co.* v. *Parke*, [1899] A. C. 535.

101, *add* (at the end of the second paragraph) the following: However, as regards gas works, entitled to the benefit of the provisions contained in the Gas Works Clauses Act (10 Vict. c. 15, s. 6), the gas company is entitled to the right of support, subject to paying the mine-owner compensation (see *Normanton Gas Co.* v. *Pope* (1883), 52 L. J. Q. B. 629).

105, footnote (*s*), *add* a reference to the Commons Act, 1899 (62 & 63 Vict. c. 30), s. 8, as to the digging of gravel.

226, footnote (*y*), *add* a reference to *Day* v. *Singleton*, [1899] 2 Ch. 320, where *Engel* v. *Fitch* was approved.

237, footnote (*q*), *add* a reference to *In re Maynard's Settled Estates*, [1899] 2 Ch. 347.

249, footnote (*n*), *add* a reference to *Day* v. *Singleton*, [1899] 2 Ch. 320, where *Bain* v. *Fothergill* was explained.

254, *after* line 12 from top, insert the following: "Upon an exception of the *timber-trees* on an estate, the soil wherein they grow will not pass,—although upon an exception of the *woods*, the soil will pass (*Liford's Case* (1615), 11 Rep. 46 b). And similarly, upon an exception of the *minerals* with liberty to get them,—as distinguished from a mere license to mine,—although the mineral solum will pass, the general solum will not pass (*Pountney* v. *Clayton* (1883), 11 Q. B. D. 820).

266, in foot-note (*t*), *add* a reference to *In re MacKenzie*, [1899] 2 Q. B. 566.

274, at foot of page, *add*: "Under the Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), s. 41, as regards ordinary farming tenants, the lessor may (in all cases where the tenant holds from year to year) resume possession of any part of the surface for mining purposes, *first giving the surface-tenant a year's notice to quit, and the notice specifying the part proposed to be resumed possession of.* And under the liberty (usual in mining leases) for the mining lessee (or licensee) to take use and occupy parts of the surface when and as the purposes of the mine require, the lessee (or licensee) may, as grantee of that liberty, exercise, *semble*, as against the surface-tenant, the same right as (*subject to the like necessity of notice as in the case of*) the lessor himself. But the consequent reduction in the surface-tenant's rent provided for by the Act, and other the

consequences in that case provided for by the Act, s. 41, would (subject to any special agreement to the contrary) affect the mining lessor only, and not the mining lessee.

Page 289, in footnote (*p*), *add* a reference to *Witham* v. *Vane* (1883), Challis R. P. 401.

321, in footnote (*a*), *add* a reference to *Hamer* v. *Knowles* (1861), 30 L. J. Exch. 102).

328, in footnote (*u*), *add* a reference to *Hamer* v. *Knowles* (1861), 30 L. J. Exch. 102).

371, in footnote (*r*) } *add* a reference to *James* v. *Cochrane* (1853), 8 Exch.
374, in footnote (*h*) } 556.

397, in footnote (*f*), *add* a reference to *Richards* v. *Jenkins* (1868), 17 W. R. 30.

399, in footnote (*n*), *add* a reference to *Williams* v. *Bagnall* (1867), 15 W. R. 272.

407, in footnote (*cc*), *add* a reference to *Trinidad Asphalte Co.* v. *Ambard* [1899] A. C. 594, the remarks of Lord MACNAGHTEN on pp. 600, 601.

409.—At the end of the first paragraph, add the following :—But where (upon the true construction of the document of severance) the right of subjacent support has been taken away, the right of adjacent support will be found, in the general case, to be also taken away,—and usually without any right to compensation for the damage. Thus, in *Williams* v. *Bagnall* (1867), 15 W. R. 272, where the plaintiff was the successor in title of the original purchaser of the surface, and the defendant was the mining lessee of the original vendor ; and it appeared, that the original vendor had,—according to a general scheme for the sale thereof,—disposed of his surface lands in lots excepting the mines under the several lots, one by one as the same lots were sold, with full liberty to work and get the mines thereunder otherwise than by entering upon the surface of the lot, and without any liability for the damage which might be done to the surface,—the court said, that the right, as regards the plaintiff's lot, to withdraw the vertical (or subjacent) support, was clearly in the exceptee of the mines,—and (inferentially) the right also to withdraw the adjacent support (which latter support was, of course, the vertical support of the adjoining lot).

410, in footnote (*a*), *add* a reference to *Hamer* v. *Knowles* (1861), 20 L. J. Exch. 102.

413, after the word "*interference by the miner*," in line 16 from top, *add* : But, under the Gas Works Clauses Act, 1847 (10 Vict. c. 15), s. 6, the mains and pipes of a gas company are entitled to support, subject to paying compensation to the mine-owner,—as was held by the Court of Appeal in *Normanton Gas Co.* v. *Pope* (1883), 52 L. J. Q. B. 629,—a decision which purported to follow the principle of the decision in *Dudley* (*Corporation*) v. *Dudley* (*Trustees*) (1881), 8 Q. B. D. 86. And inasmuch as s. 6 of the Gas Works Clauses Act 1847, has now, by the Electric Lighting Clauses Act, 1899 (62 & 63 Vict. c. 19), been made applicable, *mutatis mutandis*, to electric lighting works, these works are, *semble*, now entitled to support.

415, after the second paragraph, *add* the following : By the Brine Pumping (Compensation for Subsidence) Act, 1891 (54 & 55 Vict. c. 40),—as regards the districts of Northwich and Winsford, in the county of Chester (and as regards generally all districts in the brine country which, under the Act, have been formed into a "*compensa-*

tion district"),—subsidences are, in effect, lawful,—subject to paying compensation therefor; and the compensation is to be paid (as regards each district) out of the "*compensation fund*" for that district. These provisions are, it need hardly be mentioned, a departure entirely from the common law rights of the parties, and have been necessitated by the urgencies of the industry and by other the urgencies of the case. The legislation being altogether special, the provisions of the Act must be referred to, and they cannot be usefully summarised in this treatise.

Page 422, in footnote (*k*), *add* a reference to *Hamer* v. *Knowles* (1861), 30 L. J. Exch. 102; and see addendum to p. 455, *infra*.

424, after the words (in line 2 from foot) "*will always be recoverable*," *add*: A damage which is outside the compensation provisions of the legalising Act may, even where it is not the result of *negligence*, be recoverable,—*scil.*, when the powers of the Act are permissive only, as distinguished from being imperative (see *Canadian Pacific Rail. Co.* v. *Parke*, [1899] A. C. 535).

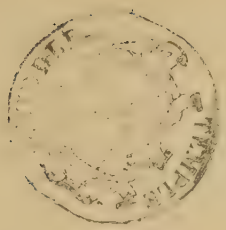
450, at foot of page, *add* the following:—In *Att.-Gen.* v. *Tomline* (1877), 5 Ch. D. 750, and on appeal (1879), 15 Ch. D., 150, where the coprolites within a certain piece of land (which was originally of copyhold tenure, and was erroneously considered still to continue of that tenure, but which had in fact by adverse possession become freehold), had been dug by the lord of the manor,—against the wishes and without the consent of the surface owner; and the lord had dug under the *bonâ fide* belief that he was entitled as lord,—the court gave as damages for the coprolites taken what was (in effect) the whole sum received by the lord on account thereof; but the court intimated that if the copyhold had remained copyhold, such damages would have been in excess of the copyholder's interest in the coprolites.

454, in footnote (*t*), *add*: This decision of the House of Lords was (in effect) an adoption of the (dissentient) opinion of COCKBURN, L.C.J., in *Lamb* v. *Walker* (1878), 3 Q. B. D. 389.

455, after the second paragraph, insert the following paragraph: In *Hamer* v. *Knowles* (1861), 30 L. J. Exch. 102, where the plaintiff had purchased, in 1851, certain surface lands, the mines under which (with certain liberties of working, but without any right to subside the surface) had been excepted on a previous sale of the surface in 1828; and it appeared, that the defendant (claiming under the exceptee of the minerals) had worked in 1849 and 1850, and had thereby (but before the plaintiff's time) occasioned a certain amount of subsidence to the surface and to the buildings thereon, and the subsidence was aggravated in the plaintiff's time,—but purely from the workings of 1849 and 1850,—the plaintiff recovered not merely the damages sustained in his own time, but also the damage occasioned before his time; but he recovered such latter damage in the name of the vendor to himself,—in the concurrent action of *Stroyan* v. *Knowles*.

495, in footnote (*r*), *add*: But see *Smith* v. *Richmond*, [1899] A. C. 448,—a decision on the 59 & 60 Vict. c. 16 (Agricultural Rates Act, 1896).

510, in footnote (*oo*), *add* a reference to *Walters* v. *Green*, [1899] 2 Ch. 696.



The Law

OF

MINES AND MINERALS.

CHAPTER I.

INTRODUCTORY:

CONTAINING AN EXPLANATION OF MINING TERMS AND PHRASES.

Mine or Quarry.

Mine or quarry.

The popular distinction between a mine and a quarry is, that the workings in the quarry are open to the daylight, while the workings in the mine are not so; and that is, also, for most purposes, the legal distinction between mine and quarry (*a*); and yet a stone mine is, for some purposes, regarded as a quarry (*b*). The etymological sense of the words mine and quarry is also in agreement with the popular use of the words —the word *mine* being derived from the Latin word *minare*, "to lead or draw," and denoting a passage or duct through or along which any substance is led or drawn under ground,—or through or along which access can be obtained under ground to any place; and the word *quarry* being derived from the Latin word *quadrare*, "to cut in squares," and denoting a place where stone is cut and afterwards dug out. We always speak of a gold mine—and never of a gold quarry; and yet gold may be obtained by quarrying. Also, we always speak of a limestone quarry, and yet the limestone may be got by mining,—in which

(*a*) *Bell* v. *Wilson* (1866), L. R. 1 Ch. App. 303, at p. 308.

(*b*) *Jones* v. *Carmarthen Slate Co.* (1879), 4 Ex. D. 97; 5 Ex. D. 93.

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latter case, the mine is properly a mine, and rateable as such (*c*), although, for the purposes of the income or property tax, the mine would, even in such a case, be dealt with as a quarry (*d*).

Mine or seam.

A *mine* sometimes denotes merely a vein or seam,—as where (in a lease or mining grant) the word occurs in some such collocation as the following :—"*All those mines, veins, and seams or beds of coal, etc.*" (*e*) ; and an unopened mine of coal or of other stratified mineral almost necessarily means merely a vein or seam (*f*). But a mine more often denotes the underground passage and workings by which the minerals are gotten, together with these minerals themselves,—and, after the minerals have been wholly extracted therefrom, the word mine would denote the empty space which (while the minerals remained ungotten) was the "*containing chamber*" (*g*).

Seam or vein.

A seam or vein is a stratum of mineral (*e.g.*, of coal) embedded in the soil, but which is geologically distinct from the soil ; and a stratum of clay or of iron-ore would also be a vein or seam, equally with a stratum of coal (*h*). A seam or vein may, of course, run through an entire district ; but in any devise or lease or other alienation of the seam or vein by the proprietor thereof, only that portion of the seam or vein would pass which lay within the ambit of his own proprietorship (*i*) ; and similarly, when a vein or seam extends through several parishes, the portion thereof which is situate within the ambit of each of the parishes is a seam or vein of itself,—at least for the purposes of all parochial rates ; and that is so, notwithstanding that the pit or shaft (and so to speak, the colliery), by which or at which the seam or vein is worked, is situate wholly in one of the parishes (*k*).

MINERALS.

Minerals.

The word *minerals*, in its widest acceptation, comprises every inorganic substance forming part of the crust or solid body of the earth other than the layer of soil which sustains vegetable life, and other than the subsoil (*l*) ; and the minerals

(*c*) *Rex* v. *Sedgley* (*Inhabitants*) (1831), 2 B. & Ad. 65.
(*d*) *Jones* v. *Carmarthen Slate Co.* (1879), 4 Ex. D. 97 ; 5 Ex. D. 93.
(*e*) *Lord Abinger* v. *Ashton* (1873), L. R. 17 Eq. 358, at p. 369.
(*f*) *Glasgow Corporation* v. *Farie* (1888), 13 App. Cas. 657.
(*g*) *Ibid.*
(*h*) *Jersey* v. *Neath Guardians* (1889), 22 Q. B. D. 555.
(*i*) *Van Mining Co.* v. *Llanidloes Overseers* (1876), 1 Ex. D. 310, at pp. 317, 318.
(*k*) *Rex* v. *Foleshill Inhabitants* (1835), 2 Ad. & E. 593.
(*l*) *Glasgow Corporation* v. *Farie*, *supra.*

may be *surface*-minerals (such as gravel and clay) or minerals buried more or less deep in the *subsoil* (*m*). Also, usually, upon any grant or conveyance of lands excepting the minerals, the minerals of either kind will remain in the grantor (*n*),—although, under exceptional circumstances, the surface minerals will (to some extent, at least) pass to the grantee (*o*). Also, minerals are not the less minerals, because they are gotten by quarrying as distinguished from mining (*p*).

Stone, a mineral.

In *Rosse* (*Earl*) v. *Wainman* (*q*), which was an action of trover by the lord for the value of minerals (stone) worked and gotten by a certain allottee within his allotment, it appeared that the Inclosure Act expressly excepted the minerals to the lord, with liberty to work and get them; and the surface damage occasioned to the allottee thereby was to be compensated by the allottees, and not by the lord (save as allottee and in his due proportion as allottee); and the Act also expressly provided, that the lord should preserve the top-layer of "*soil*" for re-spreading on the surface,—And under these circumstances, the court held, that the stone (which, as being a fossil, was a mineral) belonged to the lord under the exception, and not to the allottee, PARKE, B., observing:—The term "minerals," though more frequently applied to substances containing metals, includes in its proper sense all *fossil* bodies or matters dug out of mines; and Dr. Johnson says, that "*all metals are minerals, but all minerals are not metals*"; and mines, according to Jacob's Law Dictionary, are "*quarries or places where anything is digged*"; and in the Year Book, 17 Edw. 3, c. 7, "*minerœ de pierre*" and "*de charbon*" are spoken of. Beds of stone, which may be dug by mining or quarrying, are therefore properly minerals; and we think they must be held to be so in the present case, bearing in mind that the object of the Inclosure Act was to give the surface for cultivation to the commoners, *and to leave in the lord what it did not take away for that purpose*; and this construction is greatly favoured by the clause in the Inclosure Act, which specifically provides that the surface soil shall be kept separate,—a provision which clearly indicates that the removal of the surface soil to a great

Fossils—and all metals—are minerals, whether gotten by mining or by quarrying.

(*m*) *Glasgow Corporation* v. *Farie* (1888), 13 App. Cas. 657.
(*n*) *Midland Rail. Co.* v. *Checkley* (1867), L. R. 4 Eq. 19).
(*o*) *Glasgow Corporation* v. *Farie*, *supra*.
(*p*) *Rosse* v. *Wainman* (1845), 14 Mee. & W. 859; 2 Exch. 800.
(*q*) *Ibid.*

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extent may take place, and be subsequently restored, so that the getting strata of stone by quarrying must have been contemplated.

MINES AND MINERALS.

Mines and minerals.

The phrase *mines and minerals* has a meaning not less extensive than the word *minerals* standing alone (*r*) ; but such a phrase as *mines of coal and other minerals* would (strictly speaking) limit the "*minerals*" to what was to be gotten by mining as distinguished from quarrying,—or, in other words, the minerals would, in such a case, be only such as could be said to constitute a mine as distinguished from a quarry (*s*).

Mines of minerals.

COLLIERY.

Colliery.

A *colliery*, otherwise called (anciently) a "*coalery*," is a seam or bed (or divers seams or beds) of coal in "*industrial occupation*" (*t*) ; or, in other words, it is the place of business at which coal is won and brought to bank ; and it includes the coal strata regarded as being so won and worked and brought to bank (*u*), —so that, for example, a manager of the colliery, as of a business, may be appointed (*x*). A colliery will comprise, therefore, opened mines, together with (in general) unopened mines, that is to say, seams or veins not yet won,—or seams once opened but which have been since abandoned or left dormant, and the workings in which are to be re-opened and the seams further pursued ; and a colliery which has been worked out, — or otherwise deemed exhausted, — may be again worked, if the prospective profits shall appear to justify the expense and risk (*y*).

WINNING AND WORKING.

Coal-seam,—when it is deemed "won."

Coal is said to be "*won*," when it has been so reached as to be effectually worked (*z*) ; or when it is put in a state in which continuous working can go forward in the ordinary way (*a*).

(*r*) *Hext* v. *Gill* (1872), L. R. 7 Ch. App. 699 ; *Jersey* v. *Neath Guardians* (1889), 22 Q. B. D. 555.

(*s*) *Glasgow Corporation* v. *Farie*, (1888), 13 App. Cas. 657.

(*t*) *Gloucester Bank* v. *Rudry Colliery Co.*, [1895] 1 Ch. 629, at p. 634.

(*u*) *Ibid.* at p 637.

(*x*) *Jeffereys* v. *Smith* (1820), 1 Jac. & W. 298 ; *Gloucester Bank* v. *Rudry Colliery Co.*, *supra*.

(*y*) *Rex* v. *Bedworth* (1806), 8 East, 387.

(*z*) L. R. 5 Ch. App. 103, *per* JAMES, L.J., at p. 106 n.

(*a*) *Ibid.*, *per* HATHERLY, L.C., at p. 111 n.

When a mine (or quarry) has once been opened, the sinking of a new pit on the same vein (or the breaking ground in a new place on the same rock) is not necessarily the opening of a new mine (or quarry) (*b*),—but is usually a mere continuing of the old workings (*c*), in a more advantageous way (*d*). And when a mine once opened has been discontinued,—and so has become a *dormant* and (in a sense) *abandoned* mine, it is a question of fact, dependent on enquiry, whether the mine may still be considered an open mine or not (*e*).

New mine,—when old mine may be.

Dormant or abandoned mine,—when not a new mine.

A seam of coal would be considered a workable coal-seam, if (being worked in connection with the right to take the fire-clay therein) it could be worked to a profit, although otherwise it might not have been workable to a profit (*f*).

Coal-seam,—when it will be deemed "workable."

In *Rokeby* v. *Elliot* (*g*), the land with the minerals thereunder had come to be owned in undivided shares, three-fourths belonging to L., and the remaining one-fourth belonging to M.; and M. had sold his one-fourth to T., with an exception of the minerals, but granting to T. liberty to work one-fourth the minerals upon payment to M., his heirs and assigns, of a royalty in respect of one-fourth their value as gotten (after all the expenses of "*winning*" the minerals had been paid). The plaintiff was the successor in title of M., and the defendant was the lessee of the mines (claiming under L. as to three-fourths, and claiming under the liberty granted to T. as to the remaining one-fourth); and the plaintiff sued for his royalty, alleging that all the expenses of "winning" had been paid,—And the court decreed him the royalty. And it appearing in that case that the coal had been worked by mistake from an adjoining colliery of the defendant, the cost of driving the drift for that purpose was allowed as an expense of "*winning*"; but the cost of sinking a shaft (some years afterwards) for the better ventilation of the mine was not allowed as an expense of "winning," but was (in effect) allowed as an expense of "*working*" the coal,—the royalty commencing as from the *winning*, but being calculated only in respect of the profits after deduction of the *working* expenses. But as regards each seam separately "*won*," the

Coal-mine,—expenses of "winning" and of "working,"—distinguished.

(*b*) *Elias* v. *Snowdon Slate Co.* (1879), 4 App. Cas. 454, at p. 466.
(*c*) *Clavering* v. *Clavering* (1726), 2 P. Wms. 388.
(*d*) *Bagot* v. *Bagot* (1863), 32 Beav. 509, at p. 517; *Legge* v. *Legge* (1863), *ibid.*
(*e*) *Bagot* v. *Bagot*, *supra*; *Viner* v. *Vaughan* (1840), 2 Beav. 466; *Stoughton* v. *Leigh* (1808), 1 Taunt. 410; *Bartlett* v. *Phillips* (1859), 4 De G. & J. 414.
(*f*) *Carr* v. *Benson* (1868), L. R. 3 Ch. App. 524.
(*g*) (1878), 9 Ch. D. 685; 13 Ch. D. 277.

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winning expenses were to be first paid, before any royalty became payable in respect of the one-fourth the value of the coal subsequently worked out of that seam (*h*).

BED.

Bed or bunch.

A *bed* of coal is simply a vein or seam of coal, and there may be also a bed of clay or of iron-ore, and possibly of gold or silver or other metal ; but the minerals which are metallic do not, in the general case, lie in beds (or in veins, seams, or strata), but in nuggets, *bunches*, *bellies*, and other like deposits.

VEIN.

Lode or vein.

A *lode* or *vein* is a flattened mass of metallic matter, differing materially in its nature from the rock, earth, or stratum in which it is found ; and in breadth it may vary from a few inches to several feet ; and in length it may extend to a considerable distance, although with great irregularity of course. In position, it is sometimes perpendicular, or nearly so, descending to an unknown depth ; and sometimes the sides are parallel, and sometimes they recede from each other,—forming, in the latter case, large bellies of mineral ; and occasionally the sides approach each other so as to cause the vein or lode to almost wholly disappear. Lodes or veins also sometimes traverse each other ; and smaller lodes may be found springing out of the larger ones.

SOIL AND SUBSOIL.

Soil.

Upon an allotment of waste lands under an Inclosure Act, the allotment is of the land and soil throughout, including the minerals ; and the mines and minerals will not, in such a case, be excepted or reserved to the lord (who, before the inclosure, was the owner of the soil of the waste) by any words in the Inclosure Act which purport to merely reserve to the lord all his *royalties*, etc. (*i*) ; but an exception of the *minerals* is for that purpose required (*k*),—*scil.*, because the minerals are parcel of the *soil*, and not of the *royalty*.

Soil and subsoil.

Where the words *soil* and *subsoil* are found in combination, the word soil means the surface earth, and the word subsoil

(*h*) *Elliot* v. *Rokeby* (1881), 7 App. Cas. 43.

(*i*) *Townley* v. *Gibson* (1788), 2 T. R. 701.

(*k*) *Pretty* v. *Solly* (1859), 26 Beav. 606 ; *Wakefield* v. *Buccleuch* (*Duke*) (1870), L. R. 4 Eq. 613 ; L. R. 4 H. L. 377.

means the underground earth ; and the two words together mean and denote everything from the surface to the centre of the earth ; and where the minerals are not expressly excepted, the words *soil and subsoil* include (just as the word *soil* standing by itself would include) the minerals as well.

SURFACE AND SUBSOIL.

Surface and subsoil.

Upon a grant or conveyance of land, excepting all the minerals therein, the grant carries everything that is not comprised in the exception,—so that the grantee takes *the surface and subsoil*, only the minerals being left out ; and in such a case therefore, it is not necessary to distinguish between surface and subsoil, or to say where the surface ends and the subsoil begins. But when (as under the Public Health Acts and like Acts) the surface, *e.g.*, a "street," is vested,—or purports to be vested (by the Act),—in a public body, attempts have been made to distinguish (*l*) (but with little success) (*m*), what depth of the soil lying immediately under the surface or upper face of the street is so vested,—and the better opinion now is, that in the case of such a "street," there is no vesting of the land at all regarded as land (either of the surface or of any depth of soil thereunder) (*n*) ; and moreover, that the whole surface and subsoil regarded as land remains in the private owner, subject only to "*the statutory right in the nature of property*" which is vested by the Act in the public body,—and which statutory right is only "*such right as is sufficient to authorise the public body to sue and be sued as occasion may require*," in the course of, and as incident to, their control and management of the street (*o*) ; and the right ceases *eo instanti* when the land ceases to be a street (*p*). Consequently, the Act 41 & 42 Vict. c. 77, whereby (s. 27) it was expressly enacted, that the mines and minerals within or under any street (once a highway or turnpike road) becoming vested in the public body should not vest in the public body, but should remain in the private owner of the land, was an unnecessary enactment,—regarded in the light of the now accepted opinions,—and was merely an enactment *pro majori cautelâ* ; and yet the enactment is repeated,—and made general,—by the 46 & 47 Vict. c. 37 (*q*).

Surface and subsoil,—in the case of streets.

(*l*) *Coverdale* v. *Charlton* (1878), 4 Q. B. D. 104.
(*m*) *Tunbridge Wells* (*Corporation*) v. *Baird*, [1896] A. C. 434.
(*n*) *Ibid.*
(*o*) *Ibid.*
(*p*) *Rolls* v. *Southwark* (*Vestry*) (1880), 14 Ch. D. 785.
(*q*) *Dudley* (*Corporation*) v. *Dudley Trustees* (1881), 8 Q. B. D. 86.

SUBSTRATA.

Substrata, exception of, —user of, for passage of foreign coal.

In *Ramsay* v. *Blair* (*r*), where there was an exception of the "coals and coal-heughs," but there was no exception of the substrata generally, or of the mines and minerals generally, and the exceptee was using the containing chamber of the coal for the passage of other (or foreign) minerals through it, and (incidentally) was using the substrata generally for that purpose, —he was restrained, *scil.*, because the exception was not large enough; but in *Hamilton* (*Duke*) v. *Graham* (*s*), where the substrata were excepted generally, the passage of foreign minerals was held to be a lawful exercise of the exceptee's right of property in the substrata. And there was the like decision in *Proud* v. *Bates* (*t*); and when copyholds have been enfranchised, with an exception of the minerals, the decision would, *semble*, be the same,—although as regards copyholds remaining unenfranchised, the coal (or coal vacuum) cannot be so used (*u*).

Containing chamber.

In a copyhold grant in customary fee simple, the surface and subsoil (save only the minerals therein) are in the copyholder, —equally as in a freehold grant the surface and subsoil (and also the minerals) would be in the freeholder; and when the minerals have been withdrawn out of the copyhold subsoil, the vacuum then left (and which was theretofore the "*containing chamber*" of the minerals) vests in (that is to say, remains in) the copyholder (*x*), equally as the freehold vacuum would remain in the freeholder (*y*).

SURFACE AND MINERALS.

Surface and minerals.

Where the words *surface* and *minerals* are used in juxtaposition, the surface denotes the whole soil,—from the sky above to the centre of the earth below,—excepting only the minerals (*z*); that is to say, it is (in effect) soil and subsoil together, excepting only the minerals. In the Railways Clauses Consolidation Act, 1845 (*a*), a bed of clay forming, in fact, portion of the surface of certain lands compulsorily acquired by a railway company, was held to be a mineral (or a mine) within the exception of mines and minerals (or of mines) contained in

(*r*) (1876), 1 App. Cas. 701.
(*s*) (1871), L. R. 2 H. L. (Sc.) 166.
(*t*) (1865), 34 L. J. Ch. 406.
(*u*) *Eardley* v. *Earl Granville* (1876), 3 Ch. D. 826.
(*x*) *Ibid.*
(*y*) *Ramsay* v. *Blair* (1876), 1 App. Cas. 701.
(*z*) (*Pountney* v. *Clayton* (1883), 11 Q. B. D. 820, at pp. 833, 839, 840.
(*a*) 8 & 9 Vict. c. 20, s. 77; and (for Scotland), c. 33, s. 70.

Surface minerals and deep soil minerals.

that Act (*b*) ; and similarly, a bed of sand and gravel cropping out upon the surface (*c*) ; and similarly, a bed of ironstone, or of limestone, or other stone (*d*). On the other hand, in the Waterworks Clauses Act, 1847 (*e*), a bed of clay (valuable brick clay) forming the surface and immediate subsoil thereunder was held not to be a mineral within the exception of minerals contained in that Act (*f*). And upon a partition of lands (with the soil thereof, but excepting the minerals), the surface-minerals (such as clay, sand, gravel, and the like) might pass as parcel of the surface, the exception being limited to the deep soil minerals (*g*) ; and in the *Old Oak Common Case* (*h*), where under an Inclosure Act, the surface land was allotted, and the Act confirmed to the former owners thereof "*all the minerals, stone, and other substrata*," with power to work the same, paying compensation for the surface damage, the court was of opinion, that a bed of clay (brick earth),—lying upon and forming, in fact, part of the surface,—was portion of the allotted surface, such bed of clay not being, in fact, a "*substratum*" at all,—and the use of the words "*other substrata*" denoting that the minerals excepted (or, in effect, excepted) were the deep soil minerals only.

(*b*) *Midland Rail. Co.* v. *Haunchwood, etc. Co.* (1882), 20 Ch. D. 552.

(*c*) *Errington* v. *Metropolitan District Rail. Co.* (1882), 19 Ch. D. 559.

(*d*) *Midland Rail. Co.* v. *Robinson* (1889), 15 App. Cas. 19.

(*e*) 10 & 11 Vict. c. 17, s. 18.

(*f*) *Glasgow (Corporation)* v. *Farie* (1888), 13 App. Cas. 657.

(*g*) *Darvill* v. *Roper* (1855), 3 Drew. 294.

(*h*) *Church* v. *Inclosure Commissioners* (1858), 2 C. B. (N.S.) 664; 39 Geo. 3, c. 21, s. 12.

CHAPTER II.

FREEHOLD LANDS:

MINES WITHIN AND UNDER.

SECTION I.—*Where Surface-Lands and Mines are Owned together.*

THE surface lands and the mines and minerals within and under the lands being usually held together,—although, from various causes, the mines and minerals may have come to be held separately from the surface-lands,—we will consider in succession the respective mineral rights of the owners of freehold lands, according as they are owners in fee simple, or in fee tail, or are owners for their own lives only, or for still less estates, or are mortgagees or the like.

(i.) Fee simple owners.

(1) When entitled absolutely.

The fee simple owner of lands containing minerals, if he is (and usually he is) the absolute fee simple owner of the minerals as well, may, of course, work and get the minerals (not being gold or silver) without any restriction or liability whatsoever, save only the restriction and liability imposed by, or resulting from, the maxim *sic utere tuo ut alienum ne lædas.* Which maxim, in the case of the fee simple owner, when both surface and mines are owned together, can have reference only to the adjacent or neighbouring surface and mines, and to the owners and tenants or lessees thereof respectively ; and subject, therefore, to his not injuring the owners, tenants, and lessees of that adjacent surface, and of the mines thereunder, the fee simple owner is free to work his minerals as and when he pleases.

(2) When entitled defeasibly.

And even when the fee simple owner is entitled only to a defeasible estate, as, *e.g.*, where the lands containing the minerals are settled on A. in fee simple, but with an executory gift over to B. in fee simple, although A. may be restrained by the court from committing equitable waste, that is to say, from

doing malicious injury by the inheritance (*a*), still he cannot, *semble*, be restrained (except by the express words of the settlement) (*b*) from doing acts of legal waste, that is to say, from working new mines as well as old ; and he will be entitled, *semble*, to appropriate the whole proceeds of the mines,—although why such proceeds should not be settled to the same uses as those to which the lands stand settled, it is very difficult to see ; and the older authorities favoured the view that they should be so settled (*c*).

Fee simple,—upon an enlargement of term of years.

Where a long term of years (being a term which is enlargeable within the meaning of the Conveyancing Acts, 1881 (*d*) and 1882 (*e*)) is enlarged into the fee simple estate by means of the declaration in that behalf appointed by the Acts, the fee simple estate which is so substituted for the term is held subject to all (if any) the limitations, charges, etc., which affected the term ; and the estate in fee simple so acquired carries with it, in the ordinary case, a fee simple title to the mines and minerals also ; but where the mines have been excepted under an Inclosure Act or award, it is otherwise,—the mineral title remaining, in that case, unaffected by the enlargement ; and in other cases, also, where the mines and minerals have been severed (or become a several inheritance) either in right or in fact (*f*), the mineral title remains unaffected by the enlargement.

Mortgagee of lands and mines, joining in a sale of the lands,—effect of.

Where A. is the fee simple owner of lands containing mines, and he mortgages the lands to B., and afterwards devises the mines to K. and the lands (without the mines) to Z., and afterwards Z. sells the lands to W., and in the conveyance to W. of the purchased property, B., as mortgagee, concurs to release his mortgage,—B.'s concurrence does not give W. the mines (which he never purchased) (*g*) ; but, of course, Z. will be entitled to contribution from K. in respect of his fair share of the mortgage debt, which was discharged out of W.'s purchase money ; and in such a case, B. might well be asked to assign to Z. the legal estate in the mines, to secure to him (Z.) the amount of the mortgage debt which should

(*a*) *Turner* v. *Wright* (1860), 1 John. 740 ; 2 De G. F. & J. 234.
(*b*) *Blake* v. *Peters* (1863), 1 De G. J. & S. 345 ; 10 W. R. 826.
(*c*) *Robinson* v. *Litton* (1744), 3 Atk. 209 ; *Stansfield* v. *Habergham* (1804), 10 Ves. 278.
(*d*) 44 & 45 Vict. c. 41, s. 65.
(*e*) 45 & 46 Vict. c. 39, s. 11.
(*f*) *Smith* v. *Lloyd* (1854), 9 Exch. 562, citing *McDonnell* v. *McKinty* (1847), 10 Ir. L. R. 514.
(*g*) *Denison* v. *Holliday* (1857), 1 H. & N. 631.

properly be paid by (*i.e.*, which is properly attributable to) the mines (*h*).

Fee simple owner,—being an infant or a lunatic :—Sales and leases by, under the provisions of the relevant statutes.

Where the fee simple owner is an infant or a lunatic, the mines may be worked or leased to a working lessee,—as regards the infant, by his guardian (*i*) ; and as regards the lunatic, by his committee (*k*) ; and in either case, the court will sanction the working or lease, if the circumstances show that the same is for the benefit of the infant (*l*) or lunatic (*m*).

An infant's fee simple estates are (for the purposes of management, including the leasing and even the sale thereof) to be deemed settled estates (*n*) within the Settled Estates Act, 1877 (*o*) ; and the infant is to be deemed the tenant for life thereof in possession within the Settled Land Act, 1882 (*p*),—and the provisions as to leases and sales of settled estates or of settled land contained in the Acts of 1877 and 1882 respectively (and which are hereinafter specifically dealt with) are therefore applicable ; and a lunatic's fee simple estates are now managed under the provisions of the Lunacy Act, 1890 (*q*),—and under s. 130 of that Act, a mining lease may be granted.

Sale-proceeds, in the case of the lunatic, remain real estate.

In *Re Smith* (*r*) there were four tenants in common of land containing mines, and one of them died, having by her will given her equal fourth share to the other three ; then one of the three became of unsound mind, and the other two sold certain parts of the land and conveyed their two third parts, and also leased (by way of sale) the mines under other parts of the land, and demised their two third parts,—covenanting in each case for the concurrence of their co-tenant ; and afterwards another of the three co-tenants became of unsound mind, and the tenant of sound mind made a sale of other parts of the land, and a lease (by way of sale) of the mines under other parts, conveying and demising his one-third, and covenanting for the concurrence of the two lunatic co-tenants, and then he died ; and the year afterwards the two lunatics were proved lunatics by inquisition, and their committees (with the sanction of the court) concurred

(*h*) *Athill* v. *Athill* (1880), 16 Ch. D. 211.
(*i*) *Lyddal* v. *Clavering* (1741), Amb. 371 n. ; *Tullit* v. *Tullit* (1759), Amb. 370.
(*k*) *Re Smith* (1874), L. R. 10 Ch. App. 79.
(*l*) *Camden* v. *Murray* (1880), 16 Ch. D. 161.
(*m*) *Ex parte Grimstone* (1772), Amb. 708 ; *Oxenden* v. *Compton* (1793), 2 Ves. 69 ; *Ex parte Tabbart* (1801), 6 Ves. 428.
(*n*) 44 & 45 Vict. c. 41, s. 41.
(*o*) 40 & 41 Vict. c. 18.
(*p*) 45 & 46 Vict. c. 38.
(*q*) 53 & 54 Vict. c. 5 ; and see 54 & 55 Vict. c. 65.
(*r*) (1874), L. R. 10 Ch. App. 79.

in all the sales and leases above mentioned,—and so became entitled to the due proportions of the sale proceeds (arisen from the sales and leases) attributable to their shares respectively; then one of the two lunatics died intestate, leaving the other of them her heir and sole next-of-kin; and last of all the survivor died also,—having by her will (made before the unsoundness of mind) given all her personal estate to A., and leaving B. her heir-at-law,—and the court said, that B. was entitled to the entire sale proceeds attributable to the two lunatics' shares,—the same being deemed to remain real estate, excepting as regards such parts thereof as had arisen from the sales (and leases by way of sale) concurred in by one of the lunatics prior to her becoming lunatic.

(ii.) Tenants in tail.

(1) With power to bar the tail.

The estate of a tenant in tail is an estate which is limited to descend *per formam doni*, that is to say, in the particular line marked out for it in the entail; and the tenant in tail in possession cannot be restrained from committing waste (*s*), and may, therefore, open new mines and work and get the minerals for his own benefit; but that is so only where he is able to bar the tail; and if he is not able to do so, the heir in tail (or other the person entitled to the remainder upon the estate tail) will be in a position to control him (*t*). For example, one who was once a tenant in tail, but who is become a tenant in tail after possibility of issue extinct, although he is still a tenant in tail, and is still to be so described,—and is and remains, therefore, dispunishable for waste (*u*),—yet he may only do *legal* waste, and he may not (although the absolute fee simple owner may) do *equitable* waste; and if, therefore, such a tenant in tail should commit wanton or malicious waste, he will be restrained by the court from doing so (*x*); moreover, his privilege as regards waste is personal, and his "*grantee*," therefore, will be restrained even from *legal* waste (*y*),—and the word "*grantee*" would, *semble*, extend to include his "*lessee*" of the mines (*z*).

(2) Without that power.

Lessee of tenant in tail,—right of.

(*s*) *Doe* d. *Grubb* v. *Burlington* (1833), 5 B. & Ad. 507; Forrester's Rep. 16; *Glenorchy* v. *Bosville* (1733), Cas. temp. Talb. 16.

(*t*) (1604), 11 Rep. 50 a; Plowd. 259; Hard. R. 96.

(*u*) (1617), Co. Litt. 27 b; 2 Inst. 302; 1 Roll. Rep. 184.

(*x*) *Abraham* v. *Bubb* (1680), 2 Freem. 53; *Anon.* (1704), 2 Freem. 278; *Lewis Bowles' Case* (1616), 11 Rep. 83 a; *Cook* v. *Winford* (1701), Abr. Eq. 221.

(*y*) Co. Litt. 28 a; *Ap-Rice's Case* (1590), 3 Leon. 241.

(*z*) *Taite* v. *Gosling* (1879), 11 Ch. D. 273.

Tenant in tail after possibility of issue extinct,—his rights.

Where, under the express limitations contained in any deed or will, a person is tenant for life with remainder over to the same person in tail, the estate for life will, in general, merge in the estate tail, and the estate tail will come into possession; but when the estate tail in remainder is (that is to say, becomes) an estate tail after possibility of issue extinct, there is no merger of the life estate in the estate tail; and yet the estate tail (and not the estate for life) is, in such latter case also, to be deemed the estate in possession (*a*),—so that, in such a case, whether the estate for life is impeachable for waste (*b*) or is without impeachment by waste (*c*), the person so deemed to be in possession by virtue of such estate tail,—and who, therefore, is to be described as tenant in tail and not as tenant for life,—shall be dispunishable for waste, and entitled to commit legal waste, and also to take the whole benefit of the waste to himself,—that is to say, to take to himself and for his own benefit the whole proceeds from the minerals worked and gotten, although out of new mines; and this is because of the estate tail (properly so called) which once existed in him or her, and out of which the estate tail after possibility has arisen.

Tenant in tail *ex provisione viri*,—her rights.

In *Williams* v. *Williams* (*d*), where lands (the fee simple estate of the husband) had been settled on the husband for life without impeachment of waste, with remainder to the wife for her life, with remainder to the children of the marriage, with remainder to the heirs of the bodies of the husband and wife, with remainder to the heirs of the husband; and the husband died, and there were no chilldren of the marriage,—the question arose, whether the wife (who remarried) was tenant for life, with remainder in tail *ex provisione viri*,—or whether she was become tenant in tail in possession, although *ex provisione viri*,—the importance of the distinction being, that if only tenant for life she could not open new mines (or cut timber), but if tenant in tail in possession she could do so; and on a case sent to the court of law, it was certified, that she was become (or was to be regarded as) tenant in tail in possession,—although after possibility of issue extinct; and consequently, she was unimpeachable for waste, and entitled to cut timber (and to open mines) (*e*).

(*a*) *Lewis Bowles' Case* (1616), 11 Rep. 79 b; *S. C.* (*sub nom. Bowles* v. *Barry*), 1 Roll. Rep. 177.
(*b*) *Williams* v. *Williams* (1808), 15 Ves. 419; (1810), 12 East, 209.
(*c*) *Lewis Bowles' Case, supra.*
(*d*) (1808), 15 Ves. 419.
(*e*) (1810), 12 East, 209.

(iii.) Tenants for life.

As regards tenants entitled for life only, it is necessary to distinguish between, Firstly, tenants for life who are without impeachment for waste ; and, Secondly, tenants for life who are impeachable for waste.

(1) Without impeachment for waste.

And Firstly, the tenant for life who is without impeachment of waste may open and dig mines at his will and pleasure (*f*),— that is to say, he may commit all kinds of *legal* waste, but not, of course, *equitable* waste (*g*) ; and he will, in the general case, be entitled to take to himself and for his own exclusive benefit all the minerals worked by him and the whole of the rents and proceeds which (during his life) become payable by his lessee of the mines (*h*).

(2) When impeachable for waste.

But, Secondly, the tenant for life who is impeachable for waste, cannot, of course, commit any waste whatever, his mining rights being limited to the taking of estovers (*i*),—as regards unopened mines ; and to the "*profits*" of opened mines (*k*). And as regards the estovers of such a tenant for life, he may only dig for gravel, lime, clay, earth, and stone for the manuring of his land (*l*), and for the repair of the buildings thereon ; for if a lessee of land containing mines digs as much only as is necessary for him to use without selling, it is no waste (*m*),— provided he do so use them, but not otherwise (*n*).

Rents of open mines, —are "*profits*" of the estate.

And as regards the rents and profits of open mines, where the mines are already open at the date of the settlement, the tenant for life entitled under the settlement, whether it mention mines or not, may of course dig and work in all such mines,—*scil.*, because he is entitled to the settled land with all its current "profits" (*o*). It is competent, nevertheless, for the settlor to stipulate that a tenant for life or for years shall not work even the open mines and quarries (*p*).

(*f*) Plowd. 135.
(*g*) *Abraham* v. *Bubb* (1680), 2 Freem. 53 ; *Vane* v. *Lord Barnard* (1714), 2 Vern. 738 ; 1 Salk. 161.
(*h*) *Lewis Bowles' Case* (1616), 11 Rep. 79 ; *Bishop of London* v. *Web* (1718), 1 P. Wms. 527.
(*i*) Co. Litt. 41 b.
(*k*) *Rutland* v. *Gie* (1663), 1 Sid. 152 ; 1 Lev. 107.
(*l*) Co. Litt. 53 b, 54 b ; *Moyle* v. *Moyle* (1599), Owen, 67.
(*m*) 2 Roll. Abr. 816.
(*n*) Co. Litt. 53 b; *Countess of Plymouth* v. *Lady Archer* (1782), 1 Bro. C. C. 159.
(*o*) *Rutland* v. *Gie*, *supra*.
(*p*) *Ferrard* v. *Wilson* (1846), 15 L. J. Ch. (N.S.) 41 ; *Doe* d. *Hopkinson* v. *Ferrard* (1851), 20 L. J. C. P. (N.S.) 202.

OPEN MINES AND UNOPENED MINES.

Lease of land,—construction of, according as it does or does not expressly mention mines: Generally,—

As regards mines within and under the lands comprised in a lease for years, Lord COKE says (*q*), that if a man has land in which there is a coal mine, and he makes a lease of the land without mentioning the mine, the lessee may dig and take such mines as were open at the time of the lease made, but cannot dig for any new mine that was not then open,—for that would be adjudged waste; and if there be open mines and the owner make a lease of the land with the mines therein, this shall extend to the open mines only; but if there be no open mines, and the lease is made of the land *and of the mines therein*, then the lessee may dig new mines,—*scil.*, because otherwise the words "*and of the mines therein*" would be void (*i.e.*, would have nothing upon which they could operate).

and as regards rights of lessee.

And in *Saunders' Case* (*r*) it was resolved, that upon a lease of land and *mines*, none of the mines being open at the date of the lease, the lessee might open and work all or any of the mines; but in *Astry* v. *Ballard* (*s*), upon a lease of lands (*not mentioning the mines*), the lessee was held not entitled to the coals he had gotten out of the mines *unopened* at the date of the lease.

Mines, some open at date of settlement; and others lawfully opened subsequently,—rights of tenant for life in respect of.

The question is, of course, one of construction in all cases; it is to be observed, however, that in the case of a marriage settlement or other settlement of lands (containing mines), the fact of the express inclusion of the mines might be differently construed,—that is to say, might not receive so much importance as the like express reference in a lease of the lands would receive. Thus, in *Whitfield* v. *Bewit* (*t*), which was the case of a settlement, the settlement expressly extending to the mines and timber, but *none of the mines having been open at the date of the settlement*, the court said, that if anyone entitled under the settlement for an estate in tail should have opened and worked the mines, then any tenant for life entitled under the settlement *subsequently* to that estate tail might lawfully continue to dig and work the mines so opened, pursuing only the old veins so opened and worked as aforesaid by such previous tenant in tail; but that *until the mines had been so opened by some one entitled to the inheritance*, the tenant for life (being impeachable

(*q*) Co. Litt. 54 b.
(*r*) (1599), 5 Rep. 12.
(*s*) (1676), 2 Mod. 193.
(*t*) (1724), 2 P. Wms. 240.

for waste) could not do so. And in *Clavering* v. *Clavering* (*u*), where (under a settlement of certain lands in Durham) the defendant was tenant for life and was impeachable for waste; and the plaintiff was the remainderman in tail; and in the lands, there were divers mines of coal which had been opened out before the defendant came to his estate; and the defendant after coming into his estate dug divers pits and shafts, "*but with design only to pursue the old veins of coal*,"—the court said, that having a right to dig in the already open mine, the defendant might pursue that mine and also open new pits and shafts in order to follow the old vein; and the mine appearing not to have been opened when the settlement was made, but to have been opened subsequently by a person entitled to an estate in tail under the settlement,—the court further said, that the tenant for life might work all mines which had been lawfully opened by the precedent tenant in tail, though subsequent to the settlement.

MINE, OPEN, BY BEING LEASED.

Mines subsequently opened by trustees settlement,—distinction.

A tenant for life or for years, although impeachable for waste, being entitled to continue the working of open mines (being mines lawfully opened whether by the testator or by his predecessors in title or otherwise), and being entitled also (and consequentially) to the mine-rents or to the profits of the mine, —may, *semble*, lawfully claim also to be entitled to the rents and profits of an unopened mine which the trustees of the will (in exercise of a power contained in the will) subsequently lease or work (*x*); but not where the lease of the trustees is granted in exercise merely of their statutory power of leasing (*y*); there ought, however, to be a special clause in the will (or in other the settlement) putting the matter beyond doubt,—that is to say, a clause entitling the tenant for life to the net profits of the mines, including any which shall be lawfully opened by the trustees after the death (*z*).

Where the mines subsequently opened are merely a development of the colliery

In *Spencer* v. *Scurr* (*a*), where the fee simple owner of lands (in which there were mines and seams of coal, some worked and some not worked, or even known to exist), demised the colliery (*scil.*, the open mines) and all *other mines* within or under the lands, and subsequently devised the lands (as to one

(*u*) (1726), 2 P. Wms. 388.
(*x*) *Campbell* v. *Wardlaw* (1883), 8 App. Cas. 641.
(*y*) *Ibid.*
(*z*) *Thursby* v. *Thursby* (1875), L. R. 19 Eq. 395.
(*a*) (1862), 31 Beav. 334.

already opened, *i.e.*, leased.

moiety) to the plaintiff for her life, with remainder to the defendant in fee simple, and (as to the other moiety) to the defendant in fee simple,—and the lessees discovered the *other seams* and worked same (as well as the old seams) under the lease (and under an extension of the term granted subsequently to the testator's death),—the court held the plaintiff entitled to the moiety of the whole rents and profits derived by the lessors under the lease (and the extension thereof), and whether such rents and profits accrued from or in respect of the open seams or from or in respect of the other seams,—the opening of such other seams being a mere development of the old colliery as demised by the original lease thereof, and not being a new and independent colliery for the first time opened after the testator's death. But, *semble*, if the original lease had not extended to the *other* mines as well as to those already opened at the date thereof, the plaintiff would not have been entitled to the rents and profits (or to any part thereof) accrued or arising from the new mines, but only to the interest during his life arising from the investments made with such rents and profits regarded as capital (*b*).

An extension of an old mine is not a new mine.

When a mine (or quarry) is once become an *open* mine (or quarry), the sinking of a new pit on the same vein (or the breaking ground in a new place on the same lode) is not necessarily the opening of a new mine (or new quarry) (*c*),—nor is it usually more than a continuing of the old workings (*d*), in a more advantageous way (*e*).

A dormant or abandoned mine, re-opened,—may or may not be a new mine.

And as regards an *open* mine, which has ceased for many years to be worked,—that is to say, as regards a *dormant* or *abandoned* mine,—it is a question of degree (*f*),—that is to say, of fact depending on enquiry (*g*),—whether the mine may yet be considered an *open* mine or not: after one hundred years' abandonment, it would probably not be considered an open mine,—but after twenty or thirty years' abandonment, it might be otherwise; and (if any rise in the price of coal justified the expense of re-opening it) it might, in such a case, be regarded as an open mine (*f*).

(*b*) *Campbell* v. *Wardlaw* (1883), 8 App. Cas. 641.

(*c*) *Elias* v. *Snowdon Slate Co.*, (1879), 4 App. Cas. 454, at p. 466.

(*d*) *Clavering* v. *Clavering* (1726), 2 P. Wms. 388.

(*e*) *Bagot* v. *Bagot* (1863), 32 Beav. 509, at p. 517; *Legge* v. *Legge* (1863), 32 Beav. 509.

(*f*) *Bagot* v. *Bagot*, *supra*; and see *Stoughton* v. *Leigh* (1808), 1 Taunt. 410; *Bartlett* v. *Phillips* (1859), 4 De G. & J. 414.

(*g*) *Viner* v. *Vaughan* (1840), 2 Beav. 466.

And generally, it may be stated, that, to enable a tenant for life who is punishable for waste to work *mines*, it must be shown that the owner of the inheritance, or those acting by his authority, have commenced the working of the mines with a view to making a profit from the working thereof; and once that is established, though no profit has in fact been made, the mine is open,—*scil.*, in such a sense as to justify the continuance of the workings by the tenant for life.

General effect of the decisions.

QUARRY,—WHEN OPEN.

Also, when once it is established that a *quarry* has been worked by, or by the authority of, the owner of the inheritance for the purpose of making a profit by digging (or otherwise raising) stone thereout for sale, the same principle applies. But there is, of course, this difference between a mine and a quarry, namely, that stone or slate is frequently dug for the purpose of building or repairing houses on the property, and not for the purpose of profit; and although that is in one sense an opening of the quarry, it is not so in the sense necessary to enable such tenant for life to continue the working,—*scil.*, because it is not an opening for the purpose of profit, or a devotion of the land to the raising and sale of a portion of the inheritance (*h*); but a lease granted by the owner of the inheritance, extending to the mine or quarry in question, will be an opening of the mine or quarry (*i*).

Quarry,—when and when not to be considered open.

BRICKFIELD,—WHEN OPEN.

The lease of a brickfield (or of a field containing brick-earth), with liberty to get and carry away the clay and to manufacture it into bricks, is a valid enough lease; and the lessee may even exhaust the field, subject (where the lease so provides) to his afterwards levelling the field; but the lessor must be shown to have such an estate in the lands as warrants the lease, or else to have a power to make such a lease; and if the lease is merely of certain premises (portion of which is a field containing brick-earth), the lessee may not dig or take the earth, —much less may he exhaust the field of all the clay,—not even when the lease purports to be without impeachment of waste (*k*).

Brickfield,—lease of, effect of.

(*h*) *Elias* v. *Griffith* (1878), 8 Ch. D. 521, at p. 532.
(*i*) *Ibid.*, at p. 533.
(*k*) *Bishop of London* v. *Web* (1718), 1 P. Wms. 527.

(iv.) Tenants for life and remaindermen,—Proceeds of mines,—Title to, as between.

Waste,—proceeds of, title to.

In *Whitfield* v. *Bewit* (*l*), the general rule was recognised, that the proceeds of waste committed by the tenant for life impeachable for waste belong to the owner of the first estate of inheritance *in esse*; and in *Bewick* v. *Whitfield* (*m*), where the tenant for life was impeachable for waste, he was declared not entitled to the dividends to arise from the investments made with the proceeds of the waste, even as regards subsequent waste authorised by the court; but in *Wickham* v. *Wickham* (*n*), where the tenant for life was dispunishable for waste, he was declared entitled to such dividends for his life,—the waste being authorised by the court.

Mineral-trespass,—proceeds of, title to.

Where the minerals within or under settled land have been worked and carried away by an adjoining owner tortiously and without right, the amount of the damages recovered against him (or the agreed compensation paid by him) belongs as follows: 1st, if the tenant for life, or successive tenants for life, during the existence of whose estate or estates the trespass has been committed, are unimpeachable of waste, it belongs to such tenant for life (if only one), or proportionably between such tenants for life (if more than one) (*o*); but, 2ndly, if the tenant or tenants for life are impeachable of waste, and the trespass is in his or their time, the damages (or compensation) will belong wholly to the owner of the first estate of inheritance then *in esse* (*p*); but it will not belong to any (if there should be any) intermediate tenant for life, although he should be unimpeachable of waste (*q*),—*scil.*, because the trespass was not committed during the possession of such intermediate tenant for life.

Unauthorised mode of working,—proceeds of, title to.

In *Bell* v. *Wilson* (*r*) some freestone comprised in an exception of mines had been gotten by quarrying, the mining rights being (as the court considered) limited to getting the excepted mines by mining only (as distinguished from quarrying); and an account was directed of the freestone gotten by the improper

(*l*) (1724), 2 P. Wms. 239.
(*m*) (1734), 3 P. Wms. 267.
(*n*) (1815), 19 Ves. 419.
(*o*) *In re Barrington, Gamlen* v. *Lyon* (1886), 33 Ch. D. 523, following *Anon.* (1729), Mos. 238; and see *Waldo* v. *Waldo* (1841), 10 L. J. (N.S.) Ch. 312; *Lushington* v. *Boldero* (1851), 15 Beav. 1.
(*p*) *Uvedall* v. *Uvedall* (1648), 2 Roll. Abr. 119; *Whitfield* v. *Bewit* (1728), 2 P. Wms. 240; *Bewick* v. *Whitfield* (1734), 3 P. Wms. 267.
(*q*) *Pigot* v. *Bullock* (1792), 1 Ves. 479; *In re Barrington, Gamlen* v. *Lyon, supra.*
(*r*) (1866), 2 Dr. & Sm. 395; (1865), L. R. 1 Ch. App. 303.

working ; and it appearing that the plaintiff was tenant for life in possession, and was also entitled (subject to some intervening remainders) to the ultimate remainder in fee simple,—the court directed that the plaintiff should receive the whole amount to be found due on the account.

Authorised workings,—rents and royalties from, title to.

Where a colliery (a leasehold colliery) is given by will to A. for life with remainders over,—and the gift is by way of residue,—it is often made a question on the will, whether the whole net profits of the colliery are to be paid to A. ; and it appears, that if the "*rents and profits*" are given to A., he will be entitled to the net profits of the colliery workings (*s*),—and especially if the will expressly empowers the trustees to continue the colliery, and to defray the expenses of so doing out of the general residue of the estate ; but otherwise A. will not be entitled, save to four per cent. per annum on the value of the colliery at the testator's death, according to the general rule for the conversion and due investment of properties given by way of residue (*t*) ; and, of course, the title of A. to anything only arises after all the debts (and general and testamentary expenses) are paid,—which (in the case of an insufficiency of the personal estate) will in all cases necessitate a conversion of the leasehold colliery (*u*).

"Rents and profits" of a brickfield, —title to.

Where a testator was the fee simple owner of a brickfield and he leased it at a certain rent and at a royalty on the bricks made,—and by his will he devised the land to A. for life with remainder over, directing the trustees of his will to sell all his real estate when they conveniently could do so,—the *rents and* "*profits*" until sale and the *interest* on the investments after sale being given to the tenant for life,—and after the death of the testator, the trustees postponed selling the land, and in the meantime the whole brickfield was worked out and gotten or exhausted,—the court said, that A. was entitled to the whole amount received on account of the rent and royalty accrued due from the death (*x*),—as "*profits*."

Corpus of proceeds from waste, —title to, when complete.

In *Leeds* (*Duke*) v. *Amherst* (*y*), it was assumed (and, in fact, stated), that the plaintiff, although *in esse* at the time of the waste committed (being equitable waste), would not have become

(*s*) *Thursby* v. *Thursby* (1875), L. R. 19 Eq. 395.

(*t*) *Howe* v. *Lord Dartmouth* (1802), 7 Ves. 137.

(*u*) *Wightwick* v. *Lord* (1853), 4 De G. M. & G. 803 ; 6 H. L. Cas. 217.

(*x*) *Miller* v. *Miller* (1872), L. R. 13 Eq. 263.

(*y*) (1846), 14 Sm. 357 ; 2 Phil. 117.

absolutely entitled to the proceeds of the waste unless he had become entitled in possession,—for until then, he was only entitled in contingency.

When the sale-proceeds of timber wrongfully cut by a tenant for life have been recovered for the settlement at the suit of a beneficiary entitled in remainder, they will be held upon the trusts of the settlement,—but so nevertheless that they will belong absolutely to the first remainderman coming into possession who could have lawfully cut the timber (*z*),—*sed quære.*

Interest on sale-proceeds.

Interest at four per cent. per annum, computed from the date of the death of the wastor (who was tenant for life without impeachment of waste, and who had committed equitable waste), was given on the amount to be found due on the account directed against his estate (*a*).

Where sale set aside,—title to proceeds of interim mineral workings,

(1) In the general case:

And where estates containing mines are settled, and the trustees wrongfully sell the estates to a purchaser for value but who has notice of the settlement; and the purchaser then works and exhausts the mines; and afterwards, the estates are recovered for the settlement at the suit of the beneficiaries,—the judgment will be for recovery of the estates, *and for payment of the value of the mines so exhausted* (*b*).

(2) When the workings are adopted as rightful.

Where certain estates were settled on A. in tail, but in remainder after a life estate in K.; and in a suit instituted by A. against B. to set aside an alleged sale of part of the estates to B., and which alleged sale had been made by the settlor,—A. recovered the estates for the settlement (so that they stood settled on K. for life with remainder to A. in tail); and it appeared, that B. had sub-sold part of the estates and had sub-sold also certain unopened mines, all which sub-sales A. confirmed or adopted, accepting the sale-proceeds in lieu of the estates,—the court said, that the sale-proceeds of the mines (equally with the sale-proceeds of the lands) fell under the limitations of the settlement,—and they were to be invested; and the interest thereon was therefore to be paid to K. during the life of K.,—*scil.*, because the mines were not to be deemed *wrongfully* gotten or alienated (*c*).

(*z*) *Lowndes* v. *Norton* (1877), 6 Ch. D. 139.

(*a*) *Leeds* (*Duke*) v. *Amherst* (1846), 14 Sm. 357; 2 Phill. 117.

(*b*) *Per* Lord HARDWICKE, L.J., in *Garth* v. *Cotton* (1753), 1 Dick., at p. 202, citing *Mansell* v. *Mansell* (1731), 2 Eq. Cas. p. 747.

(*c*) *Gresley* v. *Mousley* (1862), 3 De G. F. & J. 433.

Workings which are wrongful,—as being *collusive* between tenant for life and remainderman *in esse*,—right of *mesne* remainderman, in respect of,—

(1) In the general case :

In *Garth* v. *Cotton* (*d*), where the tenant for ninety-nine years (determinable with his life) cut timber, upon an agreement between him and the defendant under which the proceeds of the timber should be divided equally between them ; and it appeared, that the defendant had received 1,000*l.* as his moiety of the sale-proceeds of the timber,—the court, at the suit of a mesne remainderman not *in esse* till long afterwards, decreed the defendant (or his estate) to repay the 1,000*l.* with interest from the date of the suit,—and that although the defendant was (at the date of the agreement) the first and only remainderman *in esse* entitled for an estate of inheritance, and would have been entitled for his own benefit to the entire sale-proceeds if the tenant for ninety-nine years had [wrongfully] cut the timber without any such an agreement,—for, the court said, the agreement was (in itself) a fraud on the mesne remainderman, even although no fraud had been intended on him : And in *Williams* v. *Duke of Bolton* (*e*), where the defendant was tenant for life in possession and was also entitled to the fee simple remainder, but subject to a *mesne* life estate in O., and subject to a *mesne* estate tail in O.'s child (if any) ; and while so entitled and before O. had any child, he cut timber ; and afterwards O. had a child (the plaintiff),—the court said, the defendant must pay into court the whole produce of the timber,—to be kept as real estate, and to be held according to the limitations of the settlement,—that is to say, the defendant could not agree with himself as to cutting the timber, without perpetrating on the *mesne* remainderman the same sort of fraud as that exemplified in *Garth* v. *Cotton*, *supra*. Latterly, however, the court has been rather disinclined to find any fraud in such a case (*f*),—as when the alleged wastor has expended an equal amount in the permanent improvement of the inheritance. And in *Birch-Wolfe* v. *Birch* (*g*), the court said, that where waste was committed by a tenant for life who was at the time entitled also to the first estate of inheritance, then, upon proof that the wastor had colluded with himself in his two capacities, his estate would be liable,—but otherwise his estate would not be liable ; and collusion would not, in such a case, be proved, unless the circumstances proved were such as would have amounted to a joint fraud on the parts of the owners entitled respectively to

(2) Where the colluding parties are one and the same person.

(*d*) (1753), 1 Dick. 183.
(*e*) (1784), 1 Cox 72.
(*f*) *Birch-Wolfe* v. *Birch* (1870), L. R. 9 Eq. 683.
(*g*) (1870), L. R. 9 Eq. 683, following *Williams* v. *Duke of* (1784), 1 Cox 72.

the estate for life and the estate of inheritance, if they had been two different individuals. And note, that even when collusion is proved in such a case, if there are no trustees to preserve the contingent remainder of inheritance, the owner of that remainder has no remedy (either at law or in equity) in respect of the waste (*h*).

Waste committed before plaintiff's title is *in esse*,—who entitled.

In *Cavendish* v. *Mundy* (*i*), where lands were settled on A. for life, with remainder to B. for life, with remainder to B.'s first son (the plaintiff) in tail, with remainders over; and A. committed waste, but such waste was before the plaintiff was born,—the court held, that the plaintiff could not sue A.'s executors in respect thereof,—in the absence, at all events, of the person or persons who (at the time of the waste committed) was or were entitled to the lands for a vested estate of inheritance. The waste in that case was in respect of timber; but the same principle would, *semble*, be applicable to waste in respect of mines.

Waste committed both before and after plaintiff's title is *in esse*,—distinction between, as to plaintiff's right to proceeds.

In *Bagot* v. *Bagot* (*k*), otherwise called *Legge* v. *Legge* (*l*), where lands were settled on A. for life, with remainder to B. for life, with remainder to the plaintiff in tail, with divers remainders over, and with an ultimate remainder to A. in fee simple,—and neither A. nor B. was expressly made dispunishable for waste,—and A. cut and felled timber, and also dug and worked certain minerals as well in old as in new mines, partly before and partly after the plaintiff's birth (the plaintiff being born in 1847, and A. having been in possession as tenant for life from 1806 till 1861),—and A. had appropriated to his own use the entire proceeds and produce of the timber and minerals,—and it appeared that certain of the mines worked were old abandoned mines,—the court said, that A. was fully entitled to re-open these old mines, and work them for his own benefit: And as regards the timber cut and the minerals gotten (the getting of which had been an act of waste on A.'s part), the court distinguished between the proceeds and produce before the plaintiff's birth and the proceeds and produce since that date and down to the date of A.'s death,—and said, that the proceeds and produce up to plaintiff's birth should be invested, and the dividends thereon paid to B. for his life, with remainder to the plaintiff absolutely; and that the proceeds and produce

(*h*) *Garth* v. *Cotton* (1750), 1 Ves. 524, 546; and 1 Dick. 183.
(*i*) W. N. (1877), p. 198.
(*k*) (1863), 32 Beav. 509.
(*l*) *Ibid.*

after plaintiff's birth, with interest at four per cent. per annum since A.'s receipt thereof, belonged to the plaintiff absolutely. But the court also intimated, that, as regards all the timber and also as regards all the last-mentioned minerals, if any part of the proceeds and produce thereof was in respect of timber which (on a due application for its sanction) the court would have sanctioned the cutting of, or was in respect of mines which (on the like application) the court would have sanctioned the getting of, no interest thereon would be payable by A.'s estate save since the death of A.,—*scil.*, because such part of the proceeds and produce would have been invested, and the dividends paid to A. himself for his life. And note, the fact that A. was, until the plaintiff's birth, himself the person entitled to the first estate of inheritance, was either overlooked altogether, or else not considered a reason either for giving A. the *corpus* of the proceeds and produce down to plaintiff's birth or for relieving A.'s estate of the payment of interest down to his (A.'s) own death,—and this may have been because A. was a wrongdoer, and (so to speak) was a tenant for life in collusion with himself as remainderman in fee simple, B. not choosing to interfere.

REMEDIES FOR EQUITABLE WASTE.

(1) Account and payment, —in respect of equitable waste.
(2) Injunction.

The remedy for equitable waste, when the relief claimed is an account and payment, runs, apparently, from the time that the plaintiff's estate comes into possession (*m*),—which will usually be the date of the death of the prior tenant for life (the wastor) ; but the remedy, when an injunction is claimed, is available, of course, at the time the waste is being committed or is threatened (*n*).

Account,—twelve years for.

For waste committed by a tenant for life who is impeachable for waste, the remainderman's right of action for an account and payment accrues on the death of the tenant for life (*o*),—and apparently, it is good for twelve years thereafter, being regarded in the light of an action to recover portion of the realty itself, and the wrongfulness of the acts of waste being waived (*o*) ; but the action should be brought promptly,—because it is an inconvenient claim to keep holding up against the estate of a

(*m*) *Leeds* (*Duke*) v. *Amherst* (1846), 14 Sim. 357 ; 2 Phil. 117.
(*n*) *Ibid.*
(*o*) *Leeds* (*Duke*) v. *Amherst* (*Earl*) (1846), 2 Phil. 117.

deceased man; and the court may (in a proper case) refuse relief, even within the twelve years (*p*).

(3) *Trover* (six years).

However, if the remainderman's action is, and is regarded as, an action of *trover*,—*i.e.*, where damages are claimed to be recovered for the *wrongful* conversion,—then the right of action first accrues on the wrongful conversion, and is barred after six years from that date (*q*).

(v.) Quasi-tenants for life.

For general purposes, the following persons are (in effect) tenants for life, that is to say:—

Firstly, a jointress;

Secondly, a dowress; and

Thirdly, a tenant by the curtesy.

(*a.*) JOINTRESS.

Jointure,—or jointure-trustees,—rights of, as regards *new* mines and *old* mines.

The estate in jointure is created by deed; and is usually for a term of years (ninety years or so) vested in trustees and determinable when the jointure is satisfied; and the term may or may not be expressed to be without impeachment for waste (*r*). Also, generally, the express powers given to the trustees of the term and other the express provisions annexed thereto will determine the question, whether or not the jointress (or the jointure-trustees) may work new mines (*s*); and apart from any such express powers and provisions, the jointress (or her trustees) may, of course, work open mines,—provided she (or they) have entered into possession under the term,—which, however, they very seldom do. Where the jointure is (in effect) a limitation to the wife for her life in remainder upon the husband's life estate, she is, of course, a tenant for life in the ordinary sense of the word; and when her estate is in possession, she will be able (by virtue of her estate) to work open mines, and also (if without impeachment of waste) to open and work new mines.

(*b.*) DOWRESS.

Dowress,—rights of, as to mines:—

The estate of the widow as *dowress* is an estate which arises by operation of law; and the estate does not entitle her to open

(*p*) *Harcourt* v. *White* (1860), 28 Beav. 303.

(*q*) *Seagram* v. *Knight* (1867), L. R. 2 Ch. App. 628; *Higginbotham* v. *Hawkins* (1872), L. R. 7 Ch. App. 676.

(*r*) *Bassett* v. *Bassett* (1674), Finch, 190; *Aston* v. *Aston* (1749), 1 Ves. 264.

(*s*) *Carew* v. *Carew* (1698), Abr. Eq. 221.

new mines, but only to work in mines already opened. Thus, in *Stoughton* v. *Leigh* (*t*), where the husband had died intestate, and at the date of his death, he was seised in fee simple, Firstly, of certain lands with the mines thereunder, and Secondly, of the mines under certain lands of another proprietor ; and he had been so seised as well before the date of his marriage as also continuously during the joint lives of himself and his wife : And as regards the mines under the intestate's own lands (hereinafter referred to as the A. mines), it appeared,—(1) That two mines (one of lead and one of coal) had been neither opened nor leased at any time ; (2) That four mines (two of lead and two of coal) had been leased for years at a minimum rent reserved in money, the lease having been made during the coverture, and one of the two lead mines and one of the two coal mines having been also opened by the lessee,—*scil.*, during the coverture ; (3) That two mines (one of lead and one of coal) had been leased for years at a rent reserved in kind, the lease having been made during the coverture, and the coal mine having been (but the lead mine not having been) opened by the lessee,—*scil.*, during the coverture ; and (4) That four mines (two of lead and two of coal) had all been opened by the intestate himself during the coverture, and were still being worked by him at the date of his death : And as regards the mines under the lands of the other proprietor (hereinafter referred to as the B. mines), it appeared,—(1) That two mines (one of lead and one of coal) had been opened by the intestate himself during the coverture, and were still being worked by him at the date of his death ; (2) That two mines (one of lead and one of coal) had been neither opened nor leased at any time ; and (3) That two mines (one of lead and one of coal) had been leased for years at a rent payable (at the lessee's option) either in money or in kind, the lease having been made during the coverture, and the lead mine having been (but the coal mine not having been) opened by the lessee,—*scil.*, during the coverture : And the question which arose was one between the intestate's widow (entitled to her dower) and the intestate's heir at law (entitled in fee simple, subject to the dower), and was this, namely,—Was the widow entitled to dower out of all or any (and which) of the A. mines,—and out of all or any (and which) of the B. mines ? The decision was, that she was entitled to her dower out of all the mines (whether A. mines or B. mines) which had

(1) As regards old mines.

(2) As regards mines which have been leased and also worked.

(3) As regards mines which have been only leased, but not worked, (*a*) Lease being invalid against dowress.

(*t*) (1808), 1 Taunt. 402.

been in fact *opened* before the intestate's death, but not out of any mines (whether leased or not) which had *not* been in fact *opened* before the death. And the court added, that, as regards the leases made during the coverture, the widow was not bound thereby; but that, as regards any mineral leases made before the coverture, the widow was bound thereby, and (as dowress) was entitled therefore to her one-third share of the rents reserved by such last mentioned leases, whether reserved in money or in kind. And here note, that any lease by the husband during the coverture would, under the present law of dower, bind the widow surviving him,—and so she (the widow) would now, unless otherwise barred, be entitled as dowress to one-third of the rents reserved thereby, equally as if the leases had been made before the coverture (*u*),—so that, in fact, the *leasing* of the mines, without any further (or other) actual working thereof, would now, *semble*, amount to an opening of the mines for all purposes relative to dower (*x*), as also generally.

(*b*) Lease being (as now) valid against dowress.

Dower,—assignment of, (1) Generally:

The widow's dower must be assigned; and no estate in dower arises until assignment. The assignment is, in general, to be made within forty days after the death of the husband; and the heir or other owner of the freehold is bound to make the assignment accordingly.

Dower may be assigned by parol, notwithstanding the statute of frauds,—*scil.*, because the estate of the dowress is not created, but is only ascertained, by the assignment; and when, after assignment, the widow has entered, the freehold vests in her without livery of seisin (*y*).

Dower may be assigned by mutual agreement between the heir or other owner of the freehold and the widow; and her acceptance of the provision by indenture will preclude her from asserting any further claim (*z*).

(2) When assignment is by the court.

In *Dickin* v. *Hamer* (*a*), where the husband had died intestate, seised in fee of certain lands containing coal mines, all of which were unopened at the date of his death; and the action being by the infant heir of the intestate against the intestate's widow for the administration of his estate, the widow was therein appointed receiver of the rents and profits of the

(*u*) *Cf. Kemeys-Tynte* v. *Kemeys-Tynte*, [1892] 2 Ch. 211.
(*x*) *Cf. Elias* v. *Griffiths* (1878), 8 Ch. D. 521, at p. 533.
(*y*) Co. Litt. 32 b, 35 a.
(*z*) (1553), Dyer, 91 b, pl. 12.
(*a*) (1860) 1 Drew. & Sm. 284.

real estates, and she was declared entitled to her dower thereout; and it was referred to the master to inquire what was due to her as from the intestate's death on account of her dower; and in the course of the suit, a lease of the coal was made with the sanction of the court, a mine rent and also a surface rent being reserved to the infant, and the widow concurred in that lease, but as guardian only for the infant,—Under these circumstances, the court held, that the widow, until assignment of her dower, was entitled to one-third part of the rents and profits of the real estate, *exclusive of the mine rents*; and, as regards the mine rents, the court pointed out that, in the lease of the coal mine to which the widow was a party, she had not bargained for any interest in respect of her dower,—although, *semble*, she might have done so; and she had, therefore, by her conduct, released her claim in that respect. And, it appearing that fourteen years had elapsed since the intestate's death before the lease of the mine was granted, the court considered that the principle of *Doe* d. *Riddell* v. *Gwinnell* (*b*),—according to which, where the assignment of dower is postponed, the value of the estate is to be taken as at the date of the assignment,—was inapplicable to the case; but otherwise the court appeared to recognise that such principle would, in the ordinary cases, have been applicable.

Old mine in close assigned,—right of dowress to work

And in *Stoughton* v. *Leigh* (*c*), where it appeared that the heir, who was of full age, had assigned to the widow as and for her dower a close of land in which was a mine which had been opened during the coverture, but the working of which had afterwards during the coverture been discontinued,—the court said, that the widow was entitled to open and work that mine, and to take the entire profits to herself,—although she might thereby be getting more than she was (as dowress) entitled to, out of the whole estate subject to dower.

Dower, assignment of, by infant,—(1) When excessive:

An infant heir may assign dower,—*scil.*, because the widow's claim is urgent for her immediate support (*d*). But the law protects the heir in such a case; for if the assignment is excessive, the infant heir may have the excess corrected by the writ of admeasurement, being a writ addressed to the sheriff, and which directs him to make a just and final admeasurement (*e*).

(*b*) (1841), 1 Q. B. 692; Co. Litt. 32 a.
(*c*) (1808), 1 Taunt. 402.
(*d*) 1 Roll. Abr. 137, 681; *Gore* v. *Perdue* (1592), Cro. Eliz. 309.
(*e*) Fitz. N. B. 149; Gilb. Dower, 385; but see Co. Litt. 39; 2 Inst. 367.

(2) When alleged excess is only result of improvements by dowress.

It has been said, that if the lands assigned by the infant heir do not exceed one-third of the whole, but become more valuable by improvements made by the widow, a writ of admeasurement will not lie on account of such improvements,—*scil.*, because the widow may have been induced to make the improvements in the belief that the assignment was proper (*f*); but if the assignment were of four acres when the number should have been three, the heir might, *semble*, take back the fourth upon the admeasurement, making compensation to the widow for the value of the improvements (*g*). However, in a clear case of fraud,—or even, *semble*, of mistake,—a new assignment of dower would be directed to be made (*h*).

Dower, assignment of, by sheriff,— (1) In the general case:

In case the widow, being entitled to, is refused her dower, she may proceed by action (at law or in equity) to recover it; and upon her right being established, the sheriff is directed to make the assignment, or a commission may issue for the purpose; but more commonly the chief clerk (or master) will be directed to assign it (*i*).

(2) In exceptional cases.

It is not necessary that the widow should have a third or other proportion of each part of the estate; and if, therefore, the husband be possessed of divers mines, the sheriff may assign such a number of them as will amount to one-third in value of the whole (*k*); and, in fact, the sheriff need not assign to her any mines at all,—*scil.*, because the widow's part may consist wholly of surface lands set out by metes and bounds; or the sheriff may divide the profits of the mines between the parties, by directing, for example, the alternate enjoyment of the mines, or by giving to the widow a part of the profits,—especially where the mines are in the hands of other persons (*l*).

(*c.*) CURTESY ESTATE OF HUSBAND.

Curtesy-tenant,— his right in respect of old mines.

This estate also, like dower, arises by the operation of law; and the estate does not entitle the husband to open new mines (*m*), but only to work in mines which are already opened (*n*). The estate of the husband is for his life in the whole of the lands,

(*f*) Fitz. N. B. 149, C.

(*g*) Roper on Husband and Wife, vol. i., p. 409; *Hoby* v. *Hoby* (1683), 1 Vern. 218.

(*h*) *Hoby* v. *Hoby* (1683), 1 Vern. 218; 2 Ch. Cas. 160; *Sneyd* v. *Sneyd* (1738), 1 Atk. 442.

(*i*) *Goodenough* v. *Goodenough* (1772), 2 Dick. 795.

(*k*) *Stoughton* v. *Leigh* (1808), 1 Taunt. 411.

(*l*) *Stoughton* v. *Leigh*, *supra*.

(*m*) 2 Inst. 299; Stat. of Glouc., 6 Edw. i. c. 5.

(*n*) *Stoughton* v. *Leigh*, *supra*.

and therefore (unlike the estate in dower of the wife) wants no assignment by the heir or other owner of the freehold, but is paramount to the estate and title of the heir or other owner of the freehold.

(v.) Tenants for years.

Tenant for years,—(1) Where impeachable for waste:

There is little, if any, difference, so far as regards the mines and minerals, between the tenant for life and a tenant for years; that is to say, the tenant for years (like the tenant for life, who is impeachable for waste) is entitled to reasonable estovers; that is, he may take minerals for the purposes of husbandry and of necessary repairs (*o*); and he may only work open mines (*p*). And where in any case the tenant for years is dispunishable for waste, then (like a tenant for life without impeachment of waste) he is entitled to open and work new mines, and will only be restrained from committing wanton waste (*q*).

(2) Where unimpeachable for waste.

(vi.) Tenants at will,—and at sufferance.

Tenants at will, or at sufferance, have no rights of *estovers* even.

As regards a tenant at will, he has no power to commit any kind of waste, and any act of waste on his part will determine his estate (*r*); and, not being bound to do any repairs, he has no right even to estovers (*s*); and a tenant at sufferance is in a still worse position (*t*).

(vii.) Co-tenants.

Co-tenants,—accountability of, *inter se*.

Co-parceners, joint tenants, and tenants in common, are liable to account to each other for the rents and profits received by either or any of them without the concurrence of the others (*u*); and they may also be restrained by injunction from equitable or malicious waste (*x*); but it is not equitable or malicious waste for one co-tenant to get (or to license another person to get) a coal mine in the ordinary course of working. Therefore, where, as in *Job* v. *Potton* (*y*), the plaintiff was tenant in common of a coal mine; and a lease for three years, in which he did not join, was made of the coal mine by his two co-tenants,—*scil.*, of their two undivided thirds of the coal; and some coal, but considerably less than two-thirds of the whole, was worked and gotten by the lessee; and he (the lessee) kept in hand one-third of

Co-tenants,—lease by one or more of several.

(*o*) Co. Litt. 41 b.
(*p*) Co. Litt. 54 b.
(*q*) *Bishop of London* v. *Web* (1718), 1 P. Wms. 527.
(*r*) Co. Litt. 57 a.
(*s*) (1584), 3 Rep. 13 b.
(*t*) Co. Litt. 57 b; 270 b.
(*u*) 4 & 5 Anne, c. 16, s. 27; *Denys* v. *Shuckburgh* (1840), 4 Yo. & C. Exch. 42.
(*x*) Bac. Abr. Waste, G.
(*y*) (1875), L. R. 20 Eq. 84.

the royalty for the plaintiff; and the plaintiff commenced his action against the lessors and their lessee, asking for an inquiry as to the value of the coal raised, and for an account against all the defendants as trespassers and for payment,—the court held, that the workings were not a trespass; that the lease was a valid lease of the two-thirds; and the decree made was, that the lessee should account for the value at the pit's mouth of the coal raised, less all costs of getting and raising it; and he was directed to pay the one-third part thereof to the plaintiff.

Co-tenants,—workings by one or more of several.

It appears, therefore, that any one of the co-tenants may work or demise his or her share without reference to the others; for there can in such a case be no action of trespass, on account of the unity of the possession between the co-tenants; and the remedy of account is always open to the other co-tenants,—unless, of course, it should have been barred by time (six years),—*scil.*, until the very title itself of the other co-tenants is also barred by time (twelve years) (*z*).

(viii.) Mortgagees in possession.

Mortgagee in possession,—not bound to work (but entitled to work) open mines;

A mortgagee has in law an absolute estate in the lands mortgaged, and is entitled, after default in payment of the mortgage debt, to take immediate possession, and to receive the rents and profits of the mortgaged estate (*a*). And as regards the mines and minerals within or under the lands comprised in the mortgage, he will be *entitled* to work any mines or quarries which have been already opened; but, of course, he is not *bound* to do so,—at least, in the general case; and in no case ought he to advance more money in a mining speculation than a prudent owner would do. For, as Lord ELDON very justly observed, if he were owner he might speculate for himself as much as he pleased,—*scil.*, because the advantages, whatever they might be, would be his, and if the speculation turned out unfortunate, he would bear the loss; but could a mortgagee be required to risk his own fortune in such a speculation, and to incur the hazards of an adventure the benefits of which would redound to the mortgagor? (*b*).

Mortgagee in possession,—

A mortgagee in possession being accountable for wilful default, it seems to follow, that if the property in mortgage be

(*z*) *Denys* v. *Shuckburgh* (1840), 4 Yo. & C. Exch. 42.

(*a*) *Williams* v. *Medlicott* (1819), 6 Price, 496.

(*b*) *Rowe* v. *Wood* (1820), 1 J. & W. 315.

a mineral estate, the mortgagee will be bound to make the most reasonable use of the estate,—*scil.*, because the nature of the estate should have been contemplated before he took possession; and at the same time, if he exceed the expenditure and risk demanded from a prudent owner, he will not be allowed such unnecessary or extravagant expenses, but will speculate at his own risk.

liable for wilful default.

Where a mortgage term of 500 years had been created in lands by the fee simple owner of the lands; and he subsequently opened a slate quarry in the lands, and worked such quarry (through certain lessees thereof who paid him a royalty of 1-18th the slate gotten); and afterwards the mortgagees entered,—the court said, that they could (although only termors) continue the working of that slate quarry, although it had not been opened at the date of the creation of the term. And it appearing that the mortgagees had obtained an order absolute of foreclosure, they were held to have become termors absolute for the residue of the 500 years (*c*).

Mortgagee in possession, being termor only,—his rights.

In *Hughes* v. *Williams* (*d*), a mortgagee in possession had opened a slate quarry at an expense of 68*l.*,—and had made 2*l.* out of the quarry,—*i.e.*, he had sustained a loss of 66*l.*; and the court left him to bear that loss, as he had speculated at his own peril. But in *Tipton Green Colliery Co.* v. *Tipton Moat Co.* (*e*), where the defendants were unpaid vendors of a leasehold colliery, and they were in possession (in respect of their lien for the unpaid purchase money), and had expended divers sums of money upon the colliery (in necessary repairs and otherwise); and the plaintiffs (the purchasers) claimed to redeem them,—the defendants were allowed (as a matter of course, *i.e.*, as "*just allowances*") all their expenses on necessary repairs, but not anything for expenses beyond.

Mortgagee in possession,—"*just allowances*" to, in case of redemption.

In *Millett* v. *Davey* (*f*), the plaintiffs were mortgagees in possession of the defendant's one equal undivided moiety of certain lands; and, in conjunction with the owner of the other undivided moiety, they made a lease of the mines, granting also certain surface rights; and under the lease, a large quantity of the minerals had been gotten, but at a loss,—and a considerable part of the surface also had been damaged, in the exercise of

Mortgagee in possession,—leasing the mines, charged only with the rents and royalties, on redemption.

(*c*) *Elias* v. *Snowdon Slate Co.* (1879), 4 App. Cas. 455.

(*d*) (1806), 12 Ves. 493; and see *Thorneycroft* v. *Crockett* (1848), 16 Sim. 445; 2 H. L. Cas. 239.

(*e*) (1877), 7 Ch. D. 192.

(*f*) (1862), 31 Beav. 470.

the surface rights; and the lessees paid up all royalties accrued due, and abandoned the mine; and the plaintiffs obtained a judgment for foreclosure against the defendant,—the security being proved to have been insufficient at the time the mortgagees entered,—the court said, that they were not to be charged with the value of the coal (the defendant's moiety thereof) which had been gotten by the lessees, but only with the royalties (the defendant's moiety thereof) received by the plaintiffs, and not at all for the surface damage.

Mortgage-deed of lands containing mines,—special clauses to be inserted in.

In a mortgage of mines, there would usually be inserted special clauses enabling the mortgagees, in case they took possession (or became entitled to take possession), to appoint a receiver and manager, and to expend moneys on the working and development of the mines (including the opening of new mines),—and in such a case, the mortgagees would be allowed their lawful expenditure with interest thereon (*g*). And the like clauses might be usefully inserted in every mortgage of lands containing mines, where the mines were a material portion of the security; and as regards keeping accounts of the mortgagees' workings, the clauses should provide for the mortgagor having inspection of the books of the colliery, but not (save at the expense of the mortgagor) for the mortgagees rendering him any account of the workings (*h*).

Mortgagee of mines,—when possession taken because security insufficient,—rights of:

And generally, as regards the opening of new mines, it appears the mortgagee may do so, if his security is insufficient; and if in such a case he acts *bonâ fide*, the court will not restrain him (*i*). But he opens the new mines at his own peril, that is to say,—if the working results in a loss, he (the mortgagee) bears the loss; and if the working results in a profit, the profit goes in or towards the discharge of his mortgage debt (*j*). But, *nota bene*, a mortgagee of lands (in which are mines), if his mortgage is by demise only (*i.e.*, if he is entitled only to a term of years in the lands), may not open *new* mines,—for a *termor* may not do so, unless he is without impeachment of waste. But just as any termor entitled absolutely may work the open mines, so may a termor who is a mortgagee (*k*),—at all events, if his security is insufficient. And if the mortgagor (or other person

(1) As to mines already open.

(*g*) *Norton* v. *Cooper* (1854), 5 De G. M. & G. 728; 25 L. J. Ch. 121.
(*h*) *Ibid.*
(*i*) *Hughes* v. *Williams* (1806), 12 Ves. 493.
(*j*) *Millett* v. *Davey* (1862), 31 Beav. 470, at p. 476.
(*k*) *Elias* v. *Griffiths* (1878), 8 Ch. D. 521; S. C. (*sub nom. Elias* v. *Snowdon Slate Co.* (1879), 4 App. Cas. 454.

(2) As to mines lawfully opened subsequently.

entitled under him subject to the mortgage term) should, during the continuance of the mortgage, lawfully open a new mine within or under the lands demised by the mortgage deed, the mortgage-termor may thereafter work such newly-opened mines,—at least, if his security be insufficient. And all the like observations are applicable also to a new *quarry*,—it being nevertheless understood that the quarry has been *opened*,—that is to say, for the purpose of being worked as a commercial speculation, and not merely for the purpose of digging a few blocks of stone thereout for some specific private purpose (*l*).

Effect, if security is not insufficient, when possession taken.

But it rather appears, that if the security is not insufficient, the mortgagee has no right to open new mines ; and that if he do open and work them, he will be charged with all the receipts from the mines, without any allowance for the expenses in opening and working them (*m*).

Mortgagee,—may have a receiver and manager of the mine.

The mortgagee of a colliery, in lieu of taking possession of the colliery,—whereby he incurs the liabilities above indicated, —ought to appoint a receiver (who will be the mortgagor's agent) ; and if a manager also should be necessary, he may obtain an order for the appointment of a receiver and manager ; and he may obtain such an order even after he has entered into possession (*n*). And the reason why the court appoints a receiver and manager is, because the security would otherwise go to ruin ; and (where the colliery is a leasehold one) it might even be forfeited by the lessor,—*scil.*, for neglect to work or for some other breach of the covenants in the lease (*o*) ; and the mere fact that the colliery *business* is not specifically comprised in the mortgage will not make any difference, a colliery being a business (*p*).

Mortgagor,—not, in general, entitled to a receiver or manager.

In *Rowe* v. *Wood* (*q*), the mortgagees were in possession, and the plaintiff (the mortgagor) was the party who applied for a receiver and manager of the mine,—alleging misconduct on the part of the defendants in the management ; but the court said, that the plaintiff could not (in that way) turn out the mortgagees from the possession so long as they alleged that

(*l*) *Elias* v. *Griffiths* (1878), 8 Ch. D. 521 ; S. C. (*sub nom. Elias* v. *Snowdon Slate Co.* (1879), 4 App. Cas. 454.

(*m*) *Thorneycroft* v. *Crockett* (1848), 16 Sim. 445 ; 2 H. L. Cas. 239 ; *Hood* v. *Easton* (1856), 2 Giff. 692 ; 2 Jur. (N.S.) 729, 917.

(*n*) *Campbell* v. *Lloyd's Bank* (1889), cited in [1891] 1 Ch. 136, n. ; *Peck* v. *Trinsmaran Co.* (1875), 2 Ch. D. 115.

(*o*) *Gloucester Bank* v. *Rudry Colliery Co.*, [1895] 1 Ch. 629.

(*p*) *Jefferys* v. *Smith* (1820), 1 J. & W. 298 ; *Gloucester Bank* v. *Rudry Colliery Co.*, *supra*.

(*q*) (1820), 1 J. & W. 315 ; (1822), 2 J. & W. 553.

they were unpaid (even a sixpence of) their mortgage debt; and all that the plaintiff (as mortgagor) was entitled to, was, to require the defendants to keep the proper accounts and to permit his inspection thereof.

Mortgagee in possession,—not charged with occupation-rent; nor bound (save at the expense of the mortgagor) to render accounts.

In *Norton* v. *Cooper* (*r*), the mortgage was of mines, with power for the mortgagees to enter and develop the mortgaged premises, and to expend money for that purpose; and the mortgagor, suing for redemption, claimed to charge the mortgagees with an occupation rent, and also to disallow them all their expenditure,—both which claims the mortgagees, of course, resisted; and they also refused accounts, save at the expense of the mortgagor. The accounts as taken in the suit showed,—16,654*l.* owing on the mortgage for principal and interest; 60,027*l.* owing as moneys properly expended in developing the mines; and 3,747*l.* owing as moneys properly paid in redeeming a previous mortgage; and 74,637*l.* received as profits from the mines,—leaving 5,790*l.* still owing to the mortgagees; and the court allowed the whole expenditure, and also gave the mortgagees their costs of suit,—holding that their conduct had not been vexatious, merely because they refused the accounts save on the mortgagor's first paying for the expense of the accounts; and the court refused, of course, to charge the mortgagees with any occupation rent.

Mortgagee of one co-tenant,—entitled to the same account as the co-tenant himself.

In *Bentley* v. *Bates* (*s*), where there were two lessees of a mine, and they were working it in quasi-partnership, and the plaintiff was the mortgagee of the interest of one of the lessee-partners, and claimed an account against the defendant who was the other lessee (the mortgagor being also a co-defendant), —the court said, that the plaintiff was entitled to all the rights of his mortgagor, and was therefore entitled to have an account of the profits (and generally of the management by the defendant) of the mine; and that he need not, for that purpose, ask for a dissolution of the partnership, as he would have been obliged to do in the case of an ordinary mercantile business,—for a co-tenancy (or joint ownership) of lands is not to be determined by a partition of the lands, before an account can be taken on behalf of one of the co-tenants against the other or others of them.

Mortgage-term,—with mining lease,

In *Taylor* v. *Mostyn* (*t*) and *Mostyn* v. *Lancaster* (*u*), certain lands containing coal mines (which in 1829 had been leased by

(*r*) (1854), 5 De G. M. & G. 728.
(*s*) (1840), 4 Y. & C. Exch. 182.
(*t*) (1882), 23 Ch. D. 583.
(*u*) *Ibid.*

the testator for a term which would expire in 1848) were devised to M. for his life, with remainder to M.'s first son in tail, and M. was empowered to lease the mines at his discretion : And M. (being in possession as tenant for life under the will) leased the mines in 1843 (for ninety-nine years) by way of mortgage to C. for securing a principal sum and interest, and with powers of working the mines similar to those contained in the 1829 lease,—which mortgage was afterwards (in 1850) transferred to X., to whom M. was already otherwise very largely indebted ; and M. at the same time mortgaged also his life estate to X. (or to a nominee of X.) ; and (by a lease in 1850) M. demised the mines to X.'s nominee for forty years at a dead rent, and at royalties,—and the last mentioned lease was duly confirmed by M.'s first son (who had in the meantime attained his age of twenty-one years, and had duly barred the tail): Afterwards, the life estate of M., and the fee simple remainder of his first son, became vested in Mostyn and others (the defendants in *Taylor* v. *Mostyn*, and who were also the plaintiffs in *Mostyn* v. *Lancaster*) ; and the 1850 lease was assigned to Taylor and others (the plaintiffs in *Taylor* v. *Mostyn*), and in them (or in the plaintiff Taylor alone as a nominee for them) were also vested the 1843 lease and the mortgage of the life estate. And the plaintiffs in *Taylor* v. *Mostyn* (by virtue of the lease of 1850) sub-let the mines to the defendants in *Mostyn* v. *Lancaster*, and Taylor at the same time (and by virtue of the lease of 1843) leased the mines to the same defendants for a term limited to expire in 1900 : And the action of *Taylor* v. *Mostyn* being for foreclosure, and the action of *Mostyn* v. *Lancaster* being for an injunction to restrain the removal of the pillars of coal in the demised mines,—The court held,—(1) That the lease of 1843 was a valid exercise of the leasing power (*x*),—and consequently that the plaintiffs in *Taylor* v. *Mostyn* (unless they were redeemed) might foreclose ; and (2) That the lease of 1850 (or the sub-lease derived out of it) did not (upon its true construction) authorise the getting of the pillars, *save with the consent* of M. (which consent, so far as regards the *past* workings, had not been obtained), although (on the expiration of the 1850 lease, and during the then residue, if any, of the life of M.) the consent of M. to the working of the pillars of coal under the lease of 1843 had been (in effect) already given by M.,—and, consequently, that the

by way of realising mortgage-debt,—(1) Right of mortgagee to forelose,—unless redeemed.

(2) Right of mortgagor,—to an injunction against improper workings

(*x*) *Sheehy* v. *Muskerry* (1848), 1 H. L. Cas. 576.

defendants must (save during such residue as aforesaid, if any of the life of M.) be restrained from removing the pillars of coal. And at a subsequent stage of the litigation (*y*), the plaintiffs in *Taylor* v. *Mostyn*, alleging that (owing to the decision in *Mostyn* v. *Lancaster*) their security was of vastly less value than the amount of their mortgage debt, neglected to prosecute their foreclosure decree; and, on the application of the defendants, the court directed them to do so, the order expressing that it was made *at the express direction of the defendants*,—so that if the costs of the further prosecution of the decree should be found to have been (without any good purpose) forced on the plaintiffs, the defendants might be ordered personally to pay such costs; and the order gave the plaintiffs liberty to apply for a stay of all further proceedings. However, while the decree was being further prosecuted (*z*), the defendants obtained from the court a declaration, that (as regards all the pillars of coal wrongfully removed by the mortgagee-lessees) the plaintiffs, as mortgagees, were to be charged with the full value of such coal, less only the cost of bringing it to bank (that is to say, allowing nothing for the cost of severing the coal); and it rather appearing that a flooding of the mines had been occasioned by the wrongful removal of such pillars, the court directed an inquiry as to that, and said that if (upon the result of that inquiry) the damage from the flooding should be traceable to the wrongful removal of the pillars of coal, the plaintiffs, as mortgagees, would be chargeable with that.

(3) Right of mortgagor,—to insist upon the redemption accounts.

(4) Liability of mortgagee,—for flooding of mine, by reason of improper workings.

SECTION II.—*Where the Mines are Owned Separately from the Surface.*

Where the mines are owned separately from the surface,—the diversity of ownership may have arisen in various ways or from various causes. For, firstly, the mines (as being royal mines) may be the property of the crown; or, secondly, the mines (as is the case with the tin mines of Cornwall and Devon, and as is the case also with the lead mines in certain parts of Derbyshire, and with the mines in the Forest of Dean) may, by force of some peculiar custom, be owned (or, at any rate, worked and gotten as of right) by persons other than the surface owners, as well as by the surface owners; or, thirdly, and

Severance of the ownership,—various causes of,—(1) Apart from statute.

(*y*) (1883), 25 Ch. D. 48. (*z*) (1886), 33 Ch. D. 226.

more usually, the mines (or some of them) may have been excepted and reserved (expressly or otherwise) upon an alienation of the surface.

(2) By force of various statutes.

Where lands are acquired (whether compulsorily or by agreement) under the provisions of the Lands Clauses Consolidation Act, 1845 (*a*), by any public company or for the purpose of any public undertaking, and by virtue of the provisions of some statute authorising the compulsory acquisition of the lands, the mines are usually excepted by the special Act,—and so are not comprised, in general, in the conveyance of the lands to the company, but are impliedly excepted out of such conveyance. Also, under the Railways Clauses Consolidation Act, 1845 (*b*), upon the acquisition of lands for the railway,—and under the Waterworks Clauses Act, 1847 (*c*), upon the acquisition of lands for the waterworks, — the mines are, in the general case, impliedly excepted out of the conveyance of the lands, excepting always such parts thereof as are necessarily dug and gotten in the construction of the railway or waterworks. All which exceptions and reservations, with the rights consequential thereto, are hereinafter specifically dealt with.

Severance,—upon an enfranchisement; and upon a commutation.

Upon an enfranchisement (voluntary or compulsory) of copyhold lands under the Copyhold Act, 1894 (*d*), the mines within or under the copyholds are impliedly excepted and reserved, unless where they are expressed to be included in the enfranchisement; that is to say, by s. 23, the ownership of the mines is, in the general case, left unaffected by the enfranchisement, and the rights of digging and getting the mines are also preserved intact; and by s. 24, larger mining rights may be given to the lord (when, as in general is the case, the minerals belong to him) (*e*). And so also, upon an enfranchisement effected by ecclesiastical lords under the Land Tax Redemption Acts (*f*), the mines and minerals are invariably reserved.

Mines severed from surface,—a several inheritance, and a several title.

Where the mines and minerals have once become separated from the surface,—in whatever way the severance may have arisen,—they become a distinct property altogether, and are a distinct possession and distinct inheritance (*g*), and with

(*a*) 8 & 9 Vict. c. 18.
(*b*) *Ibid.* c. 20, s. 77.
(*c*) 10 & 11 Vict. c. 17, s. 18.
(*d*) 57 & 58 Vict. c. 46.
(*e*) Brown's Enfranchisements, 2nd ed., pp. 67, 68, 95, 96.
(*f*) 38 Geo. 3, cc. 5, 60; 42 Geo. 3, c. 116.
(*g*) *Cullen* v. *Rich* (1741), Bull. N. P. 102; *Wilkinson* v. *Proud* (1843), 11 Mee. & W. 33.

CHAP. II.

FREEHOLD LANDS.

distinct and independent titles (*h*). And the right to a substratum of coal (or other mineral) is a hereditament corporeal,—and is a wholly different thing from a mere right to dig and get the coal within the substratum, which latter right would be a mere incorporeal hereditament (*i*).

Mines,—title to, by adverse possession, requisites to.

In *Seaman* v. *Vaudrey* (*j*), where, by a conveyance dated in 1704, the mines and veins of salt in the lands comprised in the conveyance had been excepted; and in a subsequent conveyance of those lands, no notice was taken of that exception,—the court regarded that as a mere omission, which did not affect (adversely or otherwise) the true separate ownership of the lands,—Sir WILLIAM GRANT, M.R., observing, that mines were frequently unwrought for generations, and were frequently purchased or excepted and reserved without any view to their immediate working, but for the express purpose of keeping them unwrought; and it was impossible, therefore, to infer, *from the mere non-working of the mines*, that the title to the mines was extinguished. And accordingly, the Statutes of Limitation, in the case of mines, do not apply to the mere want of possession by the mine-owner, unless there is also an adverse possession of the mines by some third party or stranger (*k*).

Adverse possession,—(1) On crown succeeding to subject's title,

and (2) On subject succeeding to crown's title.

As regards the Statutes of Limitation, the law appears to be, that when the statute has once begun to run during the title of a subject,—and (before the period of twelve, formerly twenty, years applicable to bar the subject has completely run) the title has vested in the crown, the full period of sixty years (being the period applicable to the crown) becomes applicable (*l*); but that the converse does not hold good, that is to say,—that when the statute has begun to run against the crown, and twelve (formerly twenty) years have run against the crown, but the sixty years have not yet run,—and the title of the crown then becomes vested in the subject, the subject is at once barred by the lapse of the twelve (formerly twenty) years (*m*).

Mines,—when to be excepted on a lease of the lands.

Where the freehold owner of land containing mines makes an ordinary lease of the land, and he does not except the mines, he retains indeed the ownership of the mines, but the lessee

(*h*) *Seaman* v. *Vaudrey* (1809), 16 Ves. 390; *McDonnell* v. *McKinty* (1847), 10 Ir. L. R. 525.

(*i*) *Wilkinson* v. *Proud* (1843), 11 Mee. & W. 33.

(*j*) (1809), 16 Ves. 390.

(*k*) *Smith* v. *Lloyd* (1854), 9 Exch. 562.

(*l*) *Lambert* v. *Taylor* (1825), 4 B. & C. 138.

(*m*) *Doe* d. *Watt* v. *Morris* (1835), 2 Scott, 276.

acquires the right of possession (*n*); and it is proper, therefore, in such a case, to expressly except the mines from the lease; and such exception is necessary, if the lessor should wish, *during the continuance of the lease of the land*, either to make a lease of the mines to an adjoining colliery owner or to work the mines himself.

Mines, exception of,—special rights of working and getting to be expressly excepted also,—the implied rights being insufficient.

Where mines are owned separately from the surface, the means of getting at them require to be provided for; and such provision should be made at the same time that (and in and by the same deed by which) the mines are excepted. For, although a way of necessity is deemed in law to be granted, where there is no express grant of any right of way and the close granted is wholly cut off from the highway (*o*); and although that rule of law is applicable to mines (*p*),—still any mere way of necessity is wholly insufficient for the due getting and working of the excepted mines. Therefore, along with the exception of the mines, there will also be excepted or reserved the proper mining rights,—an exception (as may here be observed) being distinguished from a reservation, when the words exception and reservation are employed or used with strict accuracy, in that the exception is of a part of the hereditament granted, while the reservation is of some right newly created and made to arise out of the grant (*q*).

Express rights and *implied* rights,—in an exception of mines,—relation of, *inter se*.

In *Earl of Cardigan* v. *Armitage* (*r*), where the grantor had excepted and reserved unto himself and his heirs all the coal in the land conveyed, together with free liberty for himself and his heirs at all times thereafter, *during the time that he and his heirs should continue owners and proprietors of certain specified demesne lands*, to sink and dig pits and otherwise to get the coals in the land conveyed, and to sell and carry away the same with carts and carriages or otherwise, at his and their will and pleasure, making a reasonable satisfaction for damages; and afterwards the demesne lands, together with (apparently) the excepted mines, were sold to the defendant; and subsequently the defendant entered and worked the mines,—In an action of trespass brought by the plaintiff (who was then owner of the lands conveyed) against the defendant for such entry and working, the plaintiff contending that, the grantor and his heirs

(*n*) *Keyse* v. *Powell* (1853), 2 El. & Bl. 132.
(*o*) Shep. Touch. 89; 11 Co. 52a.
(*p*) *Simpson* v. *Tellwright* (1698) 2 Lutw. 1247.
(*q*) Shep. Touch. 80.
(*r*) (1823), 2 Barn. & C. 197.

having ceased to be owners and proprietors of the demesne lands, the right to enter and dig was at an end according to the true construction of the express reservation,—the court held, that the defendant could at all events justify under the implied grant of the right to work and get the coal,—BAILEY, J., observing, that when anything was excepted, all things that were necessary for obtaining it were excepted also; and that the express liberty was reserved with the intention of increasing and not of diminishing the implied liberty (*s*); and that the express liberty had its necessary use,—for it went beyond the implied liberty; which latter liberty would warrant nothing beyond what was strictly necessary for the working of the coal,—that is to say, the implied liberty would allow no use of the surface to a greater extent, or for a longer duration, than should be necessary, whereas the express liberty gave greater latitude in that respect.

Express rights,—to be properly reserved;

But note, the decision shows, that the reservation of the liberties of working and getting the coal was unskilfully expressed; which unskilfulness would have been avoided by reserving the liberties to the *assigns* of the grantor and not merely to his *heirs*, and by omitting the words of qualification "*during the time that, etc.*"

and to provide for divers modes of working, etc.

Also, where the liberties of working and getting the excepted mines are intended to extend to getting them by quarrying as well as by mining, the words reserving or granting the liberties should make that clear (*t*); and they should also expressly provide, as regards the compensation (if any) which is to become payable for the damage occasioned by the exercise of the reserved liberties, and by whom such compensation is to be paid (*u*).

(*s*) *Winter* v. *Loveden* (1697), Ld. Raym. 267; *Stukeley* v. *Butler* (1615), Hob. 168.

(*t*) *Bell* v. *Wilson* (1866), 2 Dr. & Sm. 395.

(*u*) *Aspden* v. *Seddon* (1875), L. R. 10 Ch. App. 394; 1 Exch. D. 496.

CHAPTER III.

COPYHOLD LANDS AND WASTE LANDS:

MINES WITHIN AND UNDER.

Mines in waste,—and within copyhold tenements,—in lord of manor.

THE lord of the manor being entitled to the soil and freehold in the wastes of the manor, is entitled, of course, to all the mines and minerals in the wastes,—for they are, for this purpose, parcel of the soil of the wastes (*a*) ; and the lord is also entitled, in the general case, to all the mines within and under copyhold hereditaments parcel of the manor,—and that is so, even where the copyholds are of the nature of customary freeholds (*b*) ; and a conveyance of the manor will pass to the purchaser or devisee (or to the grantee) all the mines in question (*c*),—and also, *semble*, the mines within and under copyhold lands which have been enfranchised, unless the enfranchisement (deed or award) should have included (but it rarely does include) the mines and minerals as well (*d*).

ANCIENT FREEHOLDS,—MINES WITHIN.

Mines in ancient freeholds,—in the freeholder.

Copyhold lands (including customary-hold lands) are parcel of the manor of which they are holden ; but the ancient freehold lands of the manor are not parcel of the manor, although holden of it. And, in fact, as regards the ancient freehold lands of the manor, these are exactly like the ordinary freehold lands, the mines within or under which have already been considered ; and it is only necessary, therefore, now to consider (1) The copyhold portions of the manor ; and (2) The waste lands of the manor,—it being premised, that a manor, although it should have come to be a reputed manor only (*e*), is still a manor, so far as regards all questions relating to mines and minerals (*f*).

(*a*) *Townley* v. *Gibson* (1788), 2 T.R. 701.

(*b*) *Doe* d. *Reay* v. *Huntingdon*, (1803), 4 East. 271.

(*c*) *Hicks* v. *Sallitt* (1854), 3 De G. M. & G. 782.

(*d*) Scriv. on Copyholds, 7th ed., 334, 346, 347 ; Bro. on Enfranchisements, 2nd ed., 66, 216.

(*e*) *Sir Moyle Finch's Case*, (1607), 6 Rep. 64 ; 2 Roll. Abr. 122.

(*f*) *Soane* v. *Ireland* (1808), 10 East. 259.

(i.) Copyhold (and Customary-hold) lands,—Mines within.

Copyhold lands, mines within and under,—property is in lord, possession in tenant.

And, Firstly, as regards the copyhold and customary freehold lands of the manor,—The first observation to make is, that the possession of all such lands is in the tenant, although the ownership thereof is in the lord ; and the possession of the mines and minerals within and under the lands is therefore also in the tenant, although the ownership thereof is in the lord. Consequently the lord alone, and without the consent of his tenant, cannot work these mines or minerals without committing a trespass ; and the tenant alone cannot work them without committing waste (*g*). This peculiarity of copyhold lands results from certain well-known principles in the law of tenure ; for the copyholder was formerly a mere tenant at will to the lord, and he still remains (in strictness of law) only a tenant at will, —although, by a series of encroachments upon the rights of the lord, he now possesses an estate of inheritance in his lands.

Lord a trespasser, if he enter and dig.

In *Rutland* v. *Greene* (or *Gie*) (*h*), TWISDEN, C.J., conceived the lord might open a mine in a copyhold of inheritance ; but FOSTER, J., said that that would be a trespass,—and KEELING, J., was of the same opinion ; but whether the copyholder could open the mine was made a question. In *Player* v. *Roberts* (*i*), it was stated by the court, that neither the lord nor his lessee could enter upon the copyholder to dig the coals, and that the copyholder should have trespass for breaking his close and digging the coals (*i*) ; and in his Treatise on Tenures, GILBERT, C.B., says (*k*),—"It seems to me that a copyholder of inheritance cannot, without a special custom, dig for mines ; neither can the lord dig in the copyholder's lands, for the great prejudice he would do to the copyhold estate."

Tenant, unless under a special custom, cannot dig.

Special custom in respect of *stone*,—no proof of special custom in respect of *copper*.

In *The Bishop of Winchester* v. *Knight* (*l*), where the suit was for an account of the ore obtained from a copper mine in the land of the copyhold tenant of the bishop ; and the defendant contended that, as the tenants had used to cut down and sell the timber growing on their tenements, and had also dug the stone and sold it, they were therefore entitled also to the mines,—COWPER, L.C., said, that though the tenants might do one sort of waste, that might be by special grant, and was no evidence that they might commit any other kind of waste as well ; and he

(*g*) *Bourne* v. *Taylor* (1808), 10 East, 189.
(*h*) (1663), 1 Keb. 557 ; 1 Sid. 152 ; 1 Lev. 107.
(*i*) (1631), W. Jones, 243.
(*k*) Gilb. Ten. 327.
(*l*) (1717), 1 P. Wms. 406.

directed the bishop to bring an action of trover for the ore, in order to try the legal right ; which action being brought, and it appearing that no copper had ever before been discovered in the manor, the jury were unable to find a custom for the customary tenant to dig and open copper mines,—whereupon the Chancellor held, that neither the tenant without the license of the lord, nor the lord without the consent of the tenant, could dig in these copper mines, being new mines (*m*).

Special custom, if it exist, will entitle the lord to enter and dig.

Ultimately, in *Bourne* v. *Taylor* (*n*), which was an action of trespass brought for entering the lands of the plaintiff, situate in the township of Backworth, in the county of Northumberland, and digging the minerals therein ; and the defendant pleaded that the alleged trespass was committed by servants of the Duke of Northumberland, who was lord of the manor of Tynemouth, within which the lands were situate, and who claimed the minerals in the copyhold tenements of the manor,—the court observed, that, valuable as was the supposed right, there was not a single instance shown in which any lord had ventured to act upon it, although the injury to the tenant was so great that it would naturally have produced resistance on his part, resulting in an action ; and as no such action was known, it might fairly be presumed that a litigation of that kind had not taken place ; and the court held, that, in the absence of custom, the lord had no such right.

Tenant's possession of *surface*,—is possession of the *subsoil* also.

In *Lewis* v. *Branthwaite* (*o*),—being an action of trespass brought by a copyhold tenant of the manor of Abercarne, in the county of Monmouth,—it was contended, that a copyhold tenant could not proceed for a trespass to the *subsoil*, he being in possession of the surface only, and the mines being in the lord,—but Lord TENTERDEN observed that, the general rule being that he who has the surface has the subsoil, the copyholder had possession of the subsoil, though he might have no property in it ; and LITTLEDALE, J., said, that although the property in the mine might be in the lord, he had not such a possessory right in it as to entitle him to maintain trespass against a wrongdoer,—but the copyhold tenant had such a possessory right, and might recover nominal damages at the least for a trespass to the subsoil.

(*m*) *Townley* v. *Gibson* (1788), 2 T. R. 704 ; *Whitechurch* v. *Holworthy* (1812), 19 Ves. 214 ; 4 Maul. & Sel. 340.

(*n*) (1808), 10 East, 189 ; *Grey* v. *The Duke of Northumberland* (1806), 13 Ves. 236 ; (1809), 17 Ves. 281.

(*o*) (1831), 2 Barn. & Ad. 437 ; *Mitchell* v. *Dors* (1801), 6 Ves. 147.

Special custom, if it exist, will entitle the tenant to dig.

However, by special custom, either the lord or the tenant may be entitled to get the minerals in the land,—the lord, if he has still retained his original power to enter and take possession of them (*p*); and the tenant, if he has acquired the property in them. And in *Rowe* v. *Brenton* (*q*), Lord TENTERDEN, in his address to the jury, observed, that a distinct positive usage (*scil.*, a distinct special custom) for the conventionary tenants to take the minerals would be valid,—failing which, the right of property remained in the lord. It is to be remembered, however, that a copyholder for life, *without power to renew* or to nominate a successor, is incapable of acquiring, by any special custom, this proprietory right (*r*).

Acts of ownership,—the usual proof of such special custom.

For the proof of such special custom, acts of ownership are, in general, necessary; and these acts of ownership must, of course, be distinct from those over the surface, in order to give title to the minerals (*s*),—so that the exercise, *e.g.*, of rights of sporting, or the taking of estrays, or forbidding the burning of gorse, will not suffice. However, acts of ownership exercised in one or more places within an ascertained district may be evidence of the usage or special custom prevailing within the whole district, and therefore in other places within the district (*t*), —it being, of course, first proved in such a case that the places in question are within the district, and that it is an ascertained and definite district (*u*).

Foreign minerals and manorial minerals,—distinction between, as to carriage of, though copyhold subsoil.

The special custom, where it is established, will prevail, of course, only within the manor or other defined district,—and the extent of the right conferred by the custom will be limited by the custom itself,—so that, *e.g.*, a right in the lord to win and get the mines within the copyhold hereditaments of the manor will not entitle him to carry foreign minerals through the subsoil of the copyhold hereditaments (*x*). Thus, in *Eardley* v. *Granville* (*Lord*) (*y*), where the plaintiff was a copyholder of the manor of N., and the defendant was the crown lessee of the manor,—*scil.*, of the collieries, mines, seams

(*p*) Gilb. Ten. 327; *Bishop of Winchester* v. *Knight* (1717), 1 P. Wms. 406; *Bourne* v. *Taylor* (1808), 10 East, 196; *Parrott* v. *Palmer* (1834), 3 Myl. & K. 632; *Hanmer* v. *Chance* (1865), 34 L. J. Ch. 413.

(*q*) (1828), 8 Barn. & Cr. 766.

(*r*) *Mardiner* v. *Elliott* (1788), 2 T. R. 746; Gilb. Ten. 237.

(*s*) *Tyrwhitt* v. *Wynne* (1819), 2 Barn. & Ald. 554.

(*t*) *Barnes* v. *Mawson* (1813), 1 M. & S. 84.

(*u*) *Tyrwhitt* v. *Wynne* (1819), 2 Barn. & Ald. 554.

(*x*) *Bowser* v. *Maclean* (1860), 2 De G. F. & J. 415; 30 L. J. Ch. 273.

(*y*) (1876), 3 Ch. D. 826; and see *Greathead* v. *Morley* (1841), 3 Man. & G. 139; 10 L. J. (N.S.) C. P. 246.

of coal, and minerals under all the lands of the manor; and on one side of the manor there was a tract of freehold land belonging to one S., who demised the mines thereunder to X., who sub-demised them to the defendant; and the defendant had constructed a branch railway from his pit for the carriage of the manorial minerals, and he claimed a right to use the underground way beneath the plaintiff's land for the purpose of conveying not only the manorial minerals, but also the minerals worked under S.'s freehold land, to the pit and thence by his branch railway,—the court held, that he was a mere trespasser, as regarded his use of the underground way for the purpose of carrying the foreign minerals,—to wit, those worked under S.'s land, JESSELL, M.R., observing:—The estate of a copyholder in an ordinary copyhold is an estate in the soil throughout; but as regards the minerals, the property remains in the lord, the possession only being in the copyholder; and if, therefore, the lord, under a special custom in that behalf, takes away the minerals within the subsoil of the copyhold tenement, the copyholder becomes entitled to the possession of the space where the minerals formerly were; and he is entitled to use it, at his own will and pleasure, for any purpose. That is the position of the copyholder; and the minerals under the copyhold tenement having been exhausted, the defendant has no right now to trespass on the copyhold for the purpose of working the foreign coal,—although he is not committing a trespass while he carries only the crown minerals.

Tenant, mining rights of,—apart from special custom.

By special custom, the copyholder may be entitled to the whole of the minerals,—*e.g.*, all the clay (*z*),—within his own tenement; and *à fortiori*, he may be entitled to take and use any limestone, marl, clay, or gravel, for the purposes of his tenement (*a*); and he may, *semble*, be entitled to this smaller right without any special custom (*b*).

Stones, embedded in copyhold lands, and flints turned up in culti-

In *Dearden* v. *Evans* (*c*), the lord was held to be entitled to large stones which had become imbedded in the copyhold,—the court treating them as portion of the soil of the copyhold, equally as the sand and gravel therein; and it not appearing

(*z*) *Salisbury* (*Marquis*) v. *Gladstone* (1860), 6 Hurl. & N. 123; 30 L. J. Exch. 3; 2 F. & F. 256.

(*a*) Gilb. Ten. 327.

(*b*) *Heydon* v. *Smith* (1610), 13 Co. 68; 2 Brownl. 329; Godb. 173; *Ashmead* v. *Ranger* (1700), 1 Ld. Raym. 551; 3 Salk. 628; *Stephenson* v. *Hill* (1762), 3 Burr. 1278; *Doe* d. *Reay* v. *Huntington* (1803), 4 East, 271; *Brown* v. *Rawlins* (1806), 7 East, 409; *Portland* (*Duke of*) v. *Hill* (1866), 35 L. J. Ch. 439.

(*c*) (1839), 5 Mee & W. 11; 8 L. J. (N.S.) Exch. 171.

vating same land,—title to, respectively.

when or how the stones had got there, although the suggestion was that they had fallen from some scars or cliffs adjoining, the court said, that they must be taken to have been parcel of the copyhold tenement at the date of the original grant thereof. But by special custom, the copyholder might become entitled to all such stones,—or, at all events, to such of them as should be of the nature of flints turned up in the ordinary course of ploughing the field (*d*),—and that even where the "mines, minerals, and quarries of stone" should be in the lord.

Copyholders, —limited mining rights of, generally.

Also, generally, the copyholder may, by special custom, acquire limited rights over the minerals in (or other limited rights in respect of) the waste (*e*),—and he may, by such special custom, acquire also the absolute and exclusive right in respect of the minerals within his own tenement (*f*); just as, conversely, the lord may, by special custom, acquire limited rights over or in respect of the copyhold tenement (but not absolute rights) (*g*). And as regards the limited rights of the copyholder in respect of the minerals, these limited rights may be either in the nature of *estovers* (*h*),—being rights, *e.g.*, of digging for and carrying away sand and gravel *for the necessary repairs* of the copyhold tenement, and used for that purpose only (*i*); or they may be larger rights,—but of a limited nature (*k*).

Documentary evidence,—and evidence from acts of ownership,—effect of a conflict between.

The usual proof of a special custom rests mostly in acts of ownership, evidencing the usage within the manor (or other defined district); but the proof may consist of documentary evidence, *e.g.*, some old custumal of the manor. And it may happen, that the custumal defeats the usage,—as where they are in conflict,—the effect of the conflict being to convert into mere acts of usurpation what appeared *primâ facie* to be acts of ownership. And this happened in *Portland* (*Duke*) v. *Hill* (*l*), where WOOD, V.-C., in giving judgment for the plaintiff (the lord) against the defendant (a copyholder) observed as follows:—The defendant has adduced evidence, which, if it stood alone, would establish the custom (averred by him) for tenants to work

(*d*) *Tucker* v. *Linger* (1883), 21 Ch. D. 18; 8 App. Cas. 508.

(*e*) *Wilson* v. *Willes* (1806), 7 East, 121; *Clayton* v. *Corby* (1843), 5 Q. B. 415; *Curtis* v. *Daniell* (1808), 10 East, 273.

(*f*) *Salisbury* (*Marquis*) v. *Gladstone* (1860), 6 H. & N. 123; *Hanmer* v. *Chance* (1865), 4 De. G. J. & S. 626.

(*g*) *Hilton* v. *Lord Granville* (1845), 5 Q. B. 701; 1 Cr. & Phil. 283.

(*h*) Co. Litt. 122 a; *Stile* v. *Butts* (1594), Cro. Eliz. 434; *Duberley* v. *Page* (1788), 2 T. R. 391; 7 T. R. 745.

(*i*) *Peppin* v. *Shakespear* (1796), 6 T. R. 748; *Tyrringham's Case* (1584), 4 Rep. 37.

(*k*) *Wilson* v. *Willes* (1806), 7 East, 127.

(*l*) (1866), L. R. 2 Eq. 765.

the coals for sale and without limit under their ancient inclosures (*m*). However, when the documentary evidence comes to be examined, that shows that, so far as regards the *waste*, the right to dig and take the coal therein is to dig only "*propriis usis*,"—that is to say, only for their own use or consumption, and not for sale: And the right as regards the coal within the inclosed lands is necessarily the same; and the claim to dig the coals for sale is, therefore, an unauthorised extension of the limited customary rights, and the purported acts of ownership are merely acts of usurpation: The *primâ facie* right to the coals being in the lord (*n*), these purported acts of ownership cannot establish any custom,—because the custumal shows that the alleged custom did not exist at the date of such custumal; and a custom must have existed before the time of legal memory: These acts might be very good evidence of a grant by the lord to a particular tenant; but the defendant is relying on the general custom alone; and these usurpations are not sufficient, in the face of the old customary, to prove the customary right.

Acts of purporting ownership become acts of mere usurpation.

(ii.) Waste lands,—Mines within and under.

Secondly, as regards the *Waste Lands* of the manor,—The mines and minerals within and under the wastes belong to the lord of the manor, and they belong to him as part of his freehold estate, and not only in property but also in possession,—subject, however, to the general customs of the manor, whereby the copyholders enjoy, as incidental to their copyhold holdings, certain limited rights over the waste, and subject also (where subject) to any special custom of the manor, whereby the copyholders may be entitled to more extensive rights (*o*). And this estate or interest of the lord is not conferred by custom (*p*),—although custom may subject it to certain limited rights in others, being either the copyholders or the freeholders of the manor (*q*); but the estate or interest of the lord is by virtue of

Mines in waste,—property and possession both in lord, subject to the common rights.

(*m*) *Hanmer* v. *Chance* (1865), 11 Jur. (N.S.) 397.

(*n*) *Winchester* (*Bishop*) v. *Knight* (1717), 1 P. Wms. 406; *Anglesea* (*Marquis*) v. *Hatherton* (1842), 10 M. & W. 218.

(*o*) *Bolton* v. *Lowther* (1786), 2 Dick. 677; *Horsey* v. *Hagberton* (1609), Cro. Jac. 229; *Cooper* v. *Marshall* (1757), 1 Burr. 265; *Sadgrove* v. *Kirby* (1795), 6 T. R. 486; *Filewood* v. *Palmer* (1729), Mos. 169; 5 Vin. Abr. 7.

(*p*) *Folkard* v. *Hemmett* (1775), 5 T. R. 417 n. (a).

(*q*) Co. Litt. 261 a, note 205; *Hopkins* v. *Robinson* (1671), 1 Mod. 74; *Potter* v. *North* (1669), 1 Vent. 383; 1 Saund. 347; 2 Keb. 513; 1 Lev. 268; *North* v. *Coe* (1678), Vaugh. 251; 1 Lev. 253; 2 Bulst. 87, n. (6); Co. Litt. 122 a; *Kentick* v. *Pargiter* (1608), Cro. Jac. 208; *Pitt* v. *Chick* (1621), Hut. 45.

the common law ; and the lord's right in and to the soil of the waste is of so strong a nature, that it may be exercised to the destruction of the herbage (*r*) ; and it does not depend upon a sufficiency of herbage being left to the commoners (*s*).

Right of lord, to dig, —destroying the herbage :

Thus, in *Bateson* v. *Green* (*t*), where the lord claimed a right to dig clay in a common already insufficient to supply herbage for the commoners, the court held that the lord might have such a right, and that the evidence supported it,—BULLER, J., observing, that according to the evidence, the lord had always dug the common, when where and in what manner he pleased, though for a great number of years past there had not been a sufficiency of common for the tenants.

Scil., if and so far as reasonably necessary.

But although the right of the commoner in respect of the surface of the waste is subservient to the right of the lord to take the minerals, yet the lord must exercise his right in a *bonâ fide*, and not in a malicious, manner,—for if the lord exercise the right, say, of taking stone, wantonly, and so as to unnecessarily interfere with the commoner's right of pasture, he will, *semble*, be liable to an action (*u*).

Right of lord, to approve (or inclose) and lease portions of the waste, with the mines therein.

As regards the getting of the minerals within and under waste lands (being and remaining waste lands), the lord may (by himself or by his licensees) work and get them,—provided he leave a sufficiency of common for the commoners (*x*) ; and by the statute of Merton (*y*), he may inclose and lease portions of the waste,—where the only right of common is common of pasture ; and, by custom, he may inclose and lease portions of the waste,—even where there are rights of common of turbary, as well as rights of common of pasture (*z*) ; and he may grant to the lessee (in either case), provided only the lease be authorised either by the statute or by the custom, the right to dig and get the clay, sand, gravel, and other minerals within and under the lands leased (*a*),—or, *semble*, within and under the adjoining portions of the common.

Grants by lord,—of parcels of the waste.

The lord may, by custom, grant parcels of the waste to hold by copy of court roll,—every such grant being made with the

(*r*) *Bateson* v. *Green* (1793), 5 T. R. 411.
(*s*) *Arlett* v. *Ellis* (1827), 7 Barn. & C. 366, 373 ; *Rogers* v. *Taylor* (1857), 1 Hurl. & N. 706 ; 26 L. J. Exch. 203.
(*t*) *Supra.*
(*u*) *Place* v. *Jackson* (1824), 4 Dow. & R. 318.
(*x*) *Arlett* v. *Ellis* (1827), 7 B. & C. 346 ; *Hall* v. *Byron* (1877), 4 Ch. D. 667.
(*y*) 20 Hen. 3., c. 1.
(*z*) *Lascelles* v. *Lord Onslow* (1877), 2 Q. B. D. 433, citing *Filewood* v. *Palmer* (1729), Mos. 169.
(*a*) *Ibid.*

consent (and usually upon the petition) of the copyhold tenants of the manor (*b*).

Inclosure by lord,—of parcels of the waste.

The lord may also approve (*i.e.*, inclose) parcels of the waste,—provided he leave sufficient for the commoners,—and this right of the lord arises,—by force of the statute of Merton (as regards his own tenants), and by force of the statute of Westminster the second (as regards the tenants of adjoining manors); but the right under either statute is limited to inclosures against common of pasture, and does not extend to inclosures against common of turbary or other estovers (*c*).

Leases by lord,—of minerals in waste, with surface rights over waste:

The lord may, by virtue merely of his ownership of the soil of the waste and as an incident of such ownership, dig and take brick-earth, clay, marl, sand, gravel, and the like in and out of the waste,—provided he leave a sufficiency for the commoners; and by special custom he may appropriate and lease parcels of the waste together with the brick-earth, etc., therein, with liberty for his lessees to dig and take the brick-earth, etc.,—provided that they do not injure the commoners.

(*a*) the leases not extending to the entire waste:

In *Bateson* v. *Green* (*d*), the lord was held to be entitled to dig clay in the waste,—for sale and otherwise without limit, and although he thereby injured (or for the time injured) the common rights, but leaving them a sufficiency of common; and in *Arlett* v. *Ellis* (*e*), that right was not denied; but a right claimed by the lord to appropriate and lease parcels of the waste, *being a right which could only arise by custom*, was not good if unlimited,—*scil.*, because the custom was a bad custom, as being unreasonable, if it extended to authorising an appropriation of the entire waste. But in *Folkard* v. *Hammett* (*f*), where parcels of the waste were granted to hold by copy,—the grant being by custom and with the consent of the homage,—and the copyhold grantee was digging the clay within the tenement granted,—it was held that he could lawfully do so,—*scil.*, as against the common rights, and the lord not objecting.

(*b*) and the mineral workings not defeating the common rights:

In *Lascelles* v. *Onslow* (*g*), a special custom was shown whereby the lord was entitled to appropriate and lease parcels of the waste, with the brick-earth and clay therein, and to grant liberty to the lessees to dig and take the brick-earth and clay,—

(*b*) Scriv. on Copyholds, 7th ed., pp. 32, 33.
(*c*) *Ibid.*, pp. 380, 388, 390.
(*d*) (1793), 5 T. R. 416.
(*e*) (1827), 7 B. & C. 369.
(*f*) (1775), 5 T. R. 417, n.
(*g*) (1877), 2 Q. B. D. 433.

and that against not only common of pasture but also against common of turbary, and as against the freehold tenants as well as the copyhold tenants of the manor ; and the evidence of the special custom consisted of a succession of leases of the brick-earth and clay, and of the successive (and almost continuous) working and getting of the brick-earth and clay by the lessees ; but it appeared in that case, that the lord had not, by the exercise of his rights under the custom, damaged the common rights (either the pasture rights or the turbary rights) of the commoners, but had left them sufficient.

or unduly interfering with the exercise of the common rights ;

In *Hall* v. *Byron* (*h*), where the right of the lord to dig and get the turf and subsoil of the waste was established,—the court treating that right as an incident of the lord's ownership of the soil of the waste,—the court indicated, that the right could not be exercised (and an injuction was granted restraining the lord from exercising it) "*so as to prevent*, *disturb*, or *interfere with*" the common rights ; and the decree was in favour of the ancient freeholders as well as of the copyhold tenants of the manor.

or occasioning any subsidence of the surface, or of the buildings thereon.

In *Hilton* v. *Lord Granville* (*i*), where the plaintiff was the owner of two customary messuages holden of and parcel of the crown manor of N., and sued for damage done thereto by the defendant's removal of the underground support ; and the defendant justified as crown lessee of the mines, alleging both a prescription and a custom to work and get the mines without leaving support to the surface or to the buildings thereon,—the court held, that the right to the extent to which it was alleged was bad in law,—and that whether it was based on prescription or on custom,—for it wholly defeated the plaintiff's enjoyment of his messuages ; the custom as being unreasonable was bad (*k*) ; and the prescription as being calculated to create a nuisance was also bad (*l*). On the other hand, in *Paddock* v. *Forrester* (*m*), where the right alleged under the same custom was merely a right to injure the surface, otherwise than by subsidence, and subject to paying for the damage done,—the court held, that the right was good in law, the custom as so limited being reasonable enough.

(*h*) (1876), 4 Ch. D. 667.
(*i*) (1845), 5 Q. B. 701.
(*k*) *Broadbent* v *Wilkes* (1742), Willes, 360 ; 1 Wils. 63 ; 2 Str. 122, n.
(*l*) *Fowler* v. *Sanders* (1617), Cro. Jac. 446 ; *Dewell* v. *Sanders* (1618), *ibid.*, 490.
(*m*) (1842), 3 Man. & Gr. 903 ; and see *Bateson* v. *Green* (1793), 5 T. R. 416.

(iii.) Inclosures and allotments,—Mines within.

Allotments, —tenure of, in general.

When waste lands are enclosed under the provisions of the Inclosure Acts, and there is no provision as to the tenure of the enclosed lands, they are of freehold tenure,—even although the lands in respect of which the allotments are made should be of copyhold tenure (*n*) ; and if the minerals are not reserved to the lord, they will belong to the several allotees ; and note, that they will not be reserved to the lord under the ordinary saving of royalties (*o*). The reservation of the mines and minerals to the lord is usually express (*p*) ; but it may be *implied*,—that is to say, the other provisions of the Act may make it abundantly clear that the lord's original ownership of the mines was not to be interfered with ; and a provision, *e.g.*, that if the lord should enter into the lands for taking the minerals, he should make satisfaction for the damage occasioned thereby, would show that the minerals were reserved to him by implication (*q*).

Allotments, —title to minerals within.

Mines within allotments,— rights of lord to work and get, a question of construction.

An Inclosure Act usually specifies that the lord is to have the right of working the minerals reserved to him under the allotments, and also grants or reserves to the lord specific surface and other rights for that purpose, and either subject or not subject (according as the Act expresses) to paying compensation for the damage (*r*) ; and the determination of the lord's rights and liabilities in these respects is, in such cases, a mere question of the true construction of the Inclosure Act (*s*). And in *Hayles* v. *Pease and Partners* (*t*), where the provisions of the Inclosure Act were general, the lord was held to be entitled to all usual working powers, as incident to his ownership and enjoyment of the mines ; and it was said, that such usual powers would include the right of sinking shafts on any of the allotments for the purpose of winning and carrying away minerals under any part of the common.

Lord has all usual rights of working and getting ; and may sink a shaft on any allotment.

(*n*) *Doe* d. *Lowes* v. *Davidson* (1813), 2 M. & S. 175 ; *Townley* v. *Gibson* (1788), 2 T. R. 701 ; *Revell* v. *Jodrell* (1788), 2 T. R. 424 ; *Doe* d. *Sweeting* v. *Hellard* (1829), 9 Barn. & C. 789.

(*o*) *Townley* v. *Gibson*, *supra*.

(*p*) *Earl of Rosse* v. *Wainman* (1845), 14 Mee. & W. 859 ; 15 L. J. (N.S.) Exch. 67 ; 2 Exch. 800 ; *Pretty* v. *Solly* (1859), 26 Beav. 606 ; *Rylatt* v. *Marfleet* (1845), 14 L. J. (N.S.) Exch. 305 ; 14 M. & W. 233 ; *Rex* v. *Pitt* (1833), 2 Nev. & M. 363.

(*q*) *Micklethwait* v. *Winter* (1851), 20 L. J. (N.S.) Exch. 313 ; 6 Exch. Rep. 644.

(*r*) 22 & 23 Vict. c. 43, ss. 1—7.

(*s*) *Midgley* v. *Richardson* (1845), 14 M. & W. 595 ; *Bowes* v. *Lord Ravensworth* (1855), 24 L. J. C. P. 73 ; *Stourbridge Canal* v. *Dudley* (1860), 30 L. J. Q. B. 108.

(*t*) [1899] 1 Ch. 567.

Right to occasion a mining subsidence,—when and when not given by the Act.

And as regards the right of the lord (or of the lord's lessee of the mines) to occasion a subsidence of the surface,—the two following rules of construction appear to be now established regarding the true construction of these Inclosure Acts relative to this particular matter, that is to say:—Firstly, that where the lord is to have the right to work so as to cause a subsidence of the surface of the land or a subsidence of the buildings upon it, that right must be made out by express words in the Act or else by necessary implication from the Act (*u*); and, Secondly, that the presence or absence of a compensation clause,—or the sufficiency of such a clause where it is present in the Act,—is not of itself conclusive of the right, although it is a circumstance to be considered (*x*); and these observations appear to apply, whether the allotments are (by force of the Act or otherwise) to become of copyhold or to be and remain of freehold tenure.

(iv.) General Inclosure Act, 1845, and amending Acts,—Provisions of.

(1) Allotment to lord,—in respect of his title to waste,—tenure of.

By the General Inclosure Act, 1845 (*y*), which has superseded the earlier Act of 1801 (*z*), an allotment is to be made to the lord of the manor in lieu of his right and interest in the rest of the waste (s. 76),—and where the right and interest in respect whereof such allotment is made has been ascertained "*exclusively of the lord's right and interest in the mines and minerals within and under the waste*," then all these mines and minerals remain in the lord's ownership as before; and the award is (in that case) to reserve to the lord the proper mining rights with or without compensation for damage occasioned to the surface through the exercise of such rights (s. 76). And as regards the allotments to individuals, in respect of their individual tenements (whether freehold or copyhold) (s. 77),—and as regards also allotments to burgesses and the like (s. 89, 17 & 18 Vict. c. 97, s. 8),—it is expressly declared, that allotments made in respect of freehold tenements shall be of freehold tenure, and that allotments made in respect of copyhold tenements shall be of copyhold tenure (s. 94); but by the 10 & 11 Vict. c. 111, s. 6, a different tenure of any copyhold allotment may be expressly declared by the commissioners. And under the

(2) Allotments to individual proprietors,—and to classes of proprietors,—tenure of.

(*u*) *Bell* v. *Love* (1883), 10 Q. B. D. 547; *Buccleuch* v. *Wakefield* (1870), L. R. 4 H. L. Cas. 377.

(*x*) *Aspden* v. *Seddon* (1875), L. R. 10 Ch. App. 397; *Consett Waterworks* v. *Ritson* (1889), 22 Q. B. D. 318; and (on app.) 702; *Bell* v. *Earl of Dudley*, [1895] 1 Ch. 182.

(*y*) 8 & 9 Vict. c. 118.

(*z*) 41 Geo. 3, c. 109.

principal Act (8 & 9 Vict. c. 118), where part of the waste is allotted as a "regulated pasture," and the residue of the allotable waste is allotted in severalty (s. 113), the award may express that the mines and minerals within and under the regulated pasture shall remain in (or be reserved to) the lord (s. 97), and that the mines and minerals under the several allotments shall belong to the several allottees (s. 97); and when the mines and minerals are not so vested in the lord, they go with (and as part of the soil of) the regulated pasture (s. 116). Also, generally, where the mines and minerals have, prior to the inclosure, become severed from the surface, the ownership of the mines (or the right to exercise the incidental mining rights) is not to be affected by anything in the Act or in the award,—unless such ownerships have been taken into consideration and compensated by an allotment or otherwise, by the Act itself, or by the award (s. 98). And by 10 & 11 Vict. c. 111, any old inclosures (that is to say, encroachments) of over twenty years standing, or the mines and minerals within or under such encroachments, are not to be affected adversely by anything in the Act or in the award (s. 3). Also, by the 12 & 13 Vict. c. 83, persons having similar rights of common, may be dealt with as a class,—like burgesses and the like, under the principal Act (8 & 9 Vict. c. 118).

(3) Regulated pastures,—mines within.

(4) Minerals separately owned at date of inclosure.

Portions of the waste may be assigned to the surveyor of highways,—in order that the stone, gravel, and other materials therein, which are proper for the repair of the highways or roads, may be available for that purpose (s. 72).

(5) Allotment for highway repairs.

Any inclosure of the waste lands of a manor which purports to be made under the Act, requires a special Act of Parliament for its validity (s. 12),—a provision which, by the 15 & 16 Vict. c. 79, s. 1, has been extended to the inclosure of any waste or common lands whatsoever; also, no inclosure is to be made without the consent of the lord of the manor (s. 29).

A special Act,—required for every general inclosure.

And, by the 9 & 10 Vict. c. 70, where freehold lands and copyhold lands are intermixed, they may be distinguished by a supplemental award (s. 6); and similarly where leasehold lands and copyhold lands are intermixed (s. 8).

Supplemental inclosure awards.

By the 11 & 12 Vict. c. 99, s. 1, the inclosure commissioners are authorised and required to set forth in their provisional order any special matter, and to make the same a condition of the inclosure of the waste; and under that provision, they may

Mines and minerals,—usually reserved to the lord,—either (1) expressly:

allot the soil either subject or not subject to an exception and reservation to the lord of the mines and minerals within and under the allotments, and of mining rights exerciseable within (and whether under or over) the allotments ; and such exception and reservation would be valid, although the Inclosure Act should not expressly except and reserve these mines and mining rights to the lord (*a*) ; and in or by such provisional order, the commissioners may also grant to the allottees limited rights in the mines, as, *e.g.*, the right of taking freestone or limestone for the use of the allotments (*b*).

or (2) by implication.

Mining rights of lord,— to be defined in the award.

By the 14 & 15 Vict. c. 53, the mining rights reserved to the lord over the allotments may (according as expressed in the provisional order for inclosure) be made exerciseable in respect of any mines and minerals of the lord, whether under the lands or not under the lands to be inclosed, and whether within or not within the manor (s. 9), and subject or not subject to making compensation for the damage done to the surface by the exercise of such mining rights.

Lord's surface rights, in particular,— to be defined by the award.

By the 22 & 23 Vict. c. 43, where the mines and minerals are excepted out of the allotments, the provisional order for the inclosure is to specify, whether any (and what) mining rights are to be exerciseable over the surface of the allotment, subject or not subject to compensation for the surface damage (ss. 1, 3) ; and when compensation is to be made for such damage, it may be made payable either by the mine-owner (s. 2), or by means of a general rate leviable on all the allottees (ss. 2, 4), or in part by such mine-owner, and as to the residue of such compensation by means of such general rate (s. 2).

(v.) Commons Acts, 1876, 1893,—Provisions of.

Regulation of commons,— lord's mining rights preserved upon.

By the Commons Act, 1876 (*c*), further provision is made for the inclosure of waste lands and commons, and also for the regulation (in lieu of the inclosure) thereof,—the intention of the Act being, that such lands shall be regulated rather than inclosed, and that inclosure shall only be made where it is shown to be (in effect) more beneficial in respect both of public and of private interests than regulation would be ; and (in the case of suburban commons) the local authority is given a *locus standi*. But where the lord of the manor is entitled in right of

(*a*) *Musgrave* v. *Forster* (1871), L. R. 6 Q. B. 590.
(*b*) *Ibid.*
(*c*) 39 & 40 Vict. c. 56.

his lordship to the soil of the land proposed to be regulated, his consent to the regulation (equally as to the inclosure) of the common is a condition precedent to the regulation (*d*) ; and the lord's rights in respect of the soil (and to the mines and minerals within or under the waste lands) are preserved equally as under the earlier Inclosure Acts.

Private inclosures (or approvements),—preliminaries now required to.

By the Commons Act, 1876 (*e*), s. 31, any approvement or inclosure of the waste lands must be preceded by three calendar months' notice of the intention to approve or inclose,—*scil.*, unless where the inclosure is being effected under the provisions themselves of the Act ; and by the Commons Amendment Act, 1893 (*f*), s. 2, the approvement or inclosure must also now be sanctioned by the Board of Agriculture ; and by the Copyhold Act, 1894 (*g*), s. 81, the lord may not now, even under a custom warranting him to do so, grant any parcel of the waste to hold by copy, unless with the previous sanction of the same Board,—but the last-mentioned Act is expressed to be without prejudice to the exercise of any powers conferred by statute (s. 95).

(vi.) Enfranchised copyholds,—Mines within and under.

Copyholds which have been enfranchised at the common law,—mines within and under, title to.

As regards the mines and minerals within and under copy-lands which have been enfranchised, it is necessary to distinguish whether the enfranchisement has been effected at the common law or under the provisions of the Copyhold Act, 1894 (or of the earlier Copyhold Acts which have been superseded by that Act) or under the provisions of any particular statutes. Because, firstly, if the copyholds have been enfranchised at the common law, and quite apart from any of the Acts referred to,—if the mines and minerals are not expressly excepted to the lord, they will vest in the tenant equally with the surface of the lands, and as part and parcel of the soil of the lands,—this result following as a natural consequence from the words of the enfranchisement deed, which words are as extensive as the words used in any ordinary grant of freeholds. However, if the parties to the enfranchisement at common law should so intend, the minerals may be excepted in express terms ; and usually they are so excepted, and there is annexed to the exception a reservation of the proper liberties of entering, working, etc.,—*scil.*, because, in the absence of such a reservation,

(*d*) 39 & 40 Vict. c. 56, s. 12 (5).
(*e*) 39 & 40 Vict. c. 56.
(*f*) 56 & 57 Vict. c. 57.
(*g*) 57 & 58 Vict. c. 46.

the mines would after the enfranchisement remain as inaccessible to the lord as before the enfranchisement (*h*).

Copyholds which have been enfranchised under the Copyhold Acts, 1841, 1852,—mines within and under, title to.

The Copyhold Act, 1841, which authorised voluntary enfranchisements only, appears to have contemplated, that upon any enfranchisement under that Act, the mines and minerals under the lands enfranchised would (by the agreement) be excepted to the lord,—and, by s. 84, it enacted that, in aid of that exception, it should be lawful for the tenants, upon any enfranchisement under the Act, to grant to the lord such rights and liberties, exerciseable in or upon and through their respective lands, as might be requisite for the purpose of enabling the lord to win and carry away the mines and minerals ; and for that purpose, it was sufficient, if such rights and liberties were granted by the enfranchisement deed. Then came the Copyhold Act, 1852, which for the first time authorised compulsory enfranchments ; and that Act, by s. 48, provided that no enfranchisement under the Act should, without the express consent in writing of both lord and tenant, extend to or affect the estate or rights of the lord (or, in fact, of the tenant either, when the tenant had any right) in or to any mines, minerals, limestone, lime, clay, stone, gravel, pits, or quarries within or under the lands enfranchised, or within or under any other lands, or any rights of entry, rights of way and search, or other easements, of any lord or tenant in, upon, through, over, or under any lands, or any powers which, in respect of property in the soil, might but for such enfranchisement have been exercised for the purpose of enabling the lord or tenant more effectually to search for, win, and work any mines, minerals, pits, or quarries, or to remove and carry away any minerals, limestone, lime, stones, clay, gravel, or other substances had or gotten therefrom.

Copyholds which are enfranchised under the Copyhold Act, 1894,—mines within and under, title to.

And now, by the Copyhold Act, 1894 (*i*), s. 23,—which is, in fact, a mere repetition of the provisions contained in s. 48 of the Copyhold Act, 1852,—it is provided (and as regards both voluntary and compulsory enfranchisements), that no enfranchisement under the Act shall, without the express consent in writing of the lord and tenant, affect the estate or right of either to any mines, minerals, limestone, lime, clay, stone, gravel, pits, or quarries, whether in or under the land enfranchised or

(*h*) *Townley* v. *Gibson* (1788), 2 T. R. 701 ; Co. Litt. 47 a ; Brooke's Abr. title Reservacion, pl. 46.

(*i*) 57 & 58 Vict. c. 46.

not; or any right of entry, right of way and search, or other easement, of the lord or tenant, in or through, over or under, any land; or any powers which in respect of property in the soil might but for the enfranchisement have been exercised,—for the purpose of enabling the lord or tenant more effectually to search for win and work any mines, minerals, pits, or quarries, or to remove and carry away any minerals, limestone, lime, stones, clay, gravel, or other substances had or gotten therefrom, —it being provided nevertheless that the owner of the land so enfranchised shall, notwithstanding any reservation of mines or minerals in the Act or in the instrument of enfranchisement, but without prejudice to the rights to any mines or minerals or the right to work or carry away the same, have full power to disturb or remove the soil so far as is necessary or convenient for the purpose of making roads or drains or erecting buildings or obtaining water on the land. And the Act also provides (by s. 24), that on any enfranchisement under the Act, there may be reserved or granted, with the consent of the tenant, to the lord any right of way or other easement in the land enfranchised, for more effectually winning and carrying away any mines or minerals under the land; and such rights are to be reserved and granted in the enfranchisement deed (where the enfranchisement is voluntary), and in the enfranchisement award (where the enfranchisement is compulsory).

Express mining rights,—grant of, to lord.

(vii.) Commuted copyholds,—Mines within and under.

Under the earlier Copyhold Acts, the copyholds in lieu of being enfranchised might by agreement of the parties have been commuted; but the commutation did not affect the lord's right to the mines and minerals within or under the copyhold lands (*k*); and in aid of the lord's right so saved, the commuting copyholders might grant to the lord any mining rights, it being for this purpose sufficient that the fact of such rights being granted, and the consideration therefor, should be mentioned in the commutation agreement (*l*). The Copyhold Act, 1894, contains no provisions for the commutation (but only provisions for the enfranchisement) of copyhold lands.

Commuted customary-holds,—mines within and under, title to.

(*k*) Copyhold Act, 1841, s. 82. (*l*) *Ibid.*, s. 84.

CHAPTER IV.

CHURCH LANDS, CHARITY LANDS, AND MUNICIPAL LANDS:

MINES WITHIN AND UNDER.

Section I.—*Church Lands.*

Waste, by ecclesiastical owners, generally.

As regards waste by ecclesiastics,—It appears, that in very early times a prohibition against doing waste issued out of chancery, at the suit of the king, against an abbot in the king's patronage (*a*), or against a bishop (*b*) (*scil.*, Anthony Beke, the Bishop of Durham). And as regards rectors, the statute 35 Edw. 1 (*Ne rector prosternat*) provided against waste by them, — which statute (it has been said) was merely in affirmation of the common law (*c*) ; and the statute was applicable to vicars. But the law was, for a long time, not very strictly enforced (*d*),—until Lord Coke revived it (*e*),—the other judges following his example (*f*), but with much hesitation (*g*). At length, however, in *Knight* v. *Moseley* (*h*), the right of a private patron to sue a rector or vicar in respect of waste committed by such rector or vicar was recognised and fully established ; and the like remedy was also available, at suit of the patron, for waste being committed during a vacancy in the living, *e.g.*, by the widow of the last preceding incumbent (*i*). But in *Jefferson* v. *Bishop of Durham* (*k*), the right of a mere stranger to sue in respect of ecclesiastical waste was denied ; and, generally, it was considered, that such bodies as deans and chapters might be trusted to use their possessions for purposes which were justifiable (*l*) ; and that rectors and vicars

(*a*) 3 Edw. 1 ; 2 Roll. Abr. 813.
(*b*) 35 Edw. 1 ; Rot. Parl. vol. i., p. 198, No. 46.
(*c*) *Liford's Case* (1615), 11 Rep. 49.
(*d*) (1400), Year Book, 2 Hen. 4.
(*e*) *Stockman* v. *Wither* (1614), 1 Roll. 86; 2 Bulst. 279.
(*f*) *Sacker's Case* (1615), 3 Bulst. 91; Moor, 917 ; *Costerd's Case* (1619), 2 Roll. 111 ; *Knowle* v. *Harvey* (1615), 3 Bulst. 158 ; *Acland* v. *Atwell* (1615), 2 Roll. Abr. 813.
(*g*) *Rutland* v. *Greene* (or *Gie*) (1675), 1 Keb. 557 ; 1 Sid. 152 ; 1 Lev. 107 ; *Jefferson* v. *Bishop of Durham* (1797), 1 Bos. & P. 105.
(*h*) (1753), Amb. 175.
(*i*) *Hoskins* v. *Featherstone* (1789), 2 Bro. Ch. Cas. 551.
(*k*) (1797), 1 Bos. & P. 105.
(*l*) *Wither* v. *Dean and Chapter of Winchester* (1817), 3 Mer. 421.

might also, with the consents of their respective patrons, be so trusted (*m*).

(i.) Open mines and new mines.

Dignitaries, and parsons, —may dig in old mines; but not in new mines.

It may, therefore, be stated generally that a bishop (*n*), or a dean and chapter (*o*), or a rector or vicar (*p*), may cut timber for needful repairs,—and therefore may dig gravel, etc., in old gravel pits for the like limited purposes,—these limited rights being in the nature of estovers taken within their respective tenements, and which have existed from time immemorial. But it is a different question altogether, if they (the bishop, the dean and chapter, or the incumbent) presume to open new mines or to take timber *ad libitum* for sale,—for all these would be acts of waste, and also wrongful alienations within the restraining statutes to be presently mentioned (*q*). And agreeably with that distinction, in *Knight* v. *Moseley* (*r*), where the patron sued the rector for digging and getting stones in the glebe beyond his lawful estovers; and the rector pleaded (in his defence), that he had only dug in quarries then already *lawfully* opened, —it was conceded (apparently) that the rector might do that; but Lord HARDWICKE, L.C., said he could not open new mines or quarries,—and even a bishop could not do so.

New mines,— with what consents they might have been worked, formerly.

In *Duke of Marlborough* v. *St. John* (*s*), the consents of the patron and ordinary were stated to be necessary before a rector (or vicar) could cut timber upon the glebe lands otherwise than by way of estovers, and also before he could open new mines,— that statement (as explained in *Ecclesiastical Commissioners* v. *Woodhouse* (*t*) referring, however, only to the condition of things before the disabling statutes of Elizabeth were passed; so that, since the disabling statutes, even those consents would not suffice for the opening of a new mine,—for that is waste (*u*)— and also an *alienation* within the disabling statutes (*x*).

Lawful opening of mine,—what is not a.

In *Huntley* v. *Russell* (*y*), where a gravel pit on certain glebe lands had been lawfully opened by the surveyors of highways for the repair of the highways, and the rector's lessee subsequently dug and carried away gravel thereout,—the court said,

(*m*) Co. Litt. 44, n.
(*n*) *Jefferson* v. *Bishop of Durham* (1797), 1 Bos. & P. 120.
(*o*) *Wither* v. *Dean and Chapter of Winchester* (1817), 3 Mer. 421.
(*p*) *Moseley* v. *Knight* (1753), Amb. 176.
(*q*) *Dean and Chapter of Worcester's Case* (1605), 6 Rep. 37.
(*r*) (1753), Amb. 175.
(*s*) (1852), 5 De G. & Sm. 174.
(*t*) [1895] 1 Ch. 552.
(*u*) *Knight* v. *Moseley* (1753), Amb. 176; *Huntley* v. *Russell* (1849), 13 Q. B. 572.
(*x*) *Dean of Worcester's Case* (1605), 6 Rep. 37a.
(*y*) (1849), 13 Q. B. 572.

that the pit was not an open pit in the sense which entitled the rector (or his lessee) to continue digging the gravel; and the rector's executors were held accountable in respect of the gravel taken by the rector's lessee.

Clandestine opening by prior incumbent,—effect of.

In *Bartlett* v. *Phillips* (*z*), where the plaintiff was the owner of an advowson, and the endowments of the living comprised certain glebe lands situate dispersedly in the parish, and divers seams or strata of coal of great value extended throughout all the lands in the parish; and the defendant (who was the incumbent of the living) got and raised large quantities of the coal under the glebe lands, under leases or licenses granted by him to certain adjoining colliery owners, who worked the glebe coal by instroke from their own collieries,—so that the workings under the glebe lands were not apparent on the surface,—the court held, that the leases and licenses were unlawful; and, further, that the wrongful opening of the coal measures during a previous incumbency did not constitute these measures open mines so as to justify the defendant's continuing to work them, it appearing that such previous workings had been, in fact, clandestine. And in the very recent case of the *Ecclesiastical Commissioners* v. *Woodhouse* (*a*), where the glebe lands contained gypsum, and also clay or marl, and the rector (the defendant W.) agreed (subject to the proper consents being obtained) to lease these minerals to his co-defendant S.; and S. worked them before the lease was obtained, and paid the rents and royalties to the rector, who paid them over to the plaintiffs: but the consent of the patron or of the ordinary was never obtained, and the plaintiffs eventually refused to sanction the proposed lease to the defendant S.,—although under the 5 & 6 Vict. c. 108 they might have sanctioned it,—the court restrained the defendant S. from further working the minerals, all parties agreeing to say nothing as regards the past workings and past payments of the royalties: And the court also said, following *Huntley* v. *Russell* (*b*) and *Bartlett* v. *Phillips* (*c*), that the previous wrongful workings of the prior incumbent did not make the mines open mines so as to authorise the defendant W. to continue working them.

Continued working of a mine not lawfully opened,—may either (1) be restrained by injunction;

Or (2) may be permitted,—subject to account.

In *Holden* v. *Weeks* (*d*), where the glebe contained certain mines or quarries of gypsum, and the patron agreed with the

(*z*) (1859), 4 De G. & J. 414.
(*a*) [1895] 1 Ch. 552.
(*b*) (1849), 13 Q. B. 572.
(*c*) (1859), 4 De G. & J. 421.
(*d*) (1860), 1 J. & H. 278.

incumbent that the incumbent should get the gypsum by means of a lease or license to H.,—which lease or license was duly granted, and the gypsum was worked to some considerable extent under it,—the court said, that the agreement required the consent of the ordinary, and (*semble*) of the Ecclesiastical Commissioners also; but it being obviously for the benefit of the living that the gypsum should be worked, and the rents and royalties capitalized by way of substitution for the gypsum taken away, the court directed an inquiry as to how the gypsum might be lawfully worked and gotten; and the incumbent's lessee (or licensee) was permitted to continue the workings in the meantime, rendering an account.

(ii.) Leases and other alienations, at the common law.

Sales and leases of church-lands,—powers of bishops, etc.; and of parsons, etc.,—at the common law.

By the common law—that is to say, apart from the disabling or restraining statutes to be presently mentioned—an ecclesiastical corporation aggregate (*e.g.*, a dean and chapter) might at their own will have wholly alienated their possessions (*e*); but ecclesiastical corporations sole (*e.g.*, a bishop, a dean, or a rector) could only alienate their possessions subject to certain restrictions, that is to say:—The lease of an archbishop or bishop required the confirmation of the dean and chapter of the diocese (*f*); the lease of a dean, or of an archdeacon or prebendary, required the confirmation of the bishop, and also of the dean and chapter,—although if the deanery were a donative, the dean's lease required to be confirmed by the king alone (*g*); and the lease of a rector or vicar required the confirmation of the patron and of the ordinary (*h*),—but if the rectory or vicarage was a donative, it required to be confirmed by the patron alone (*i*); and in all cases where the bishop was the patron, the lease required to be confirmed by the dean and chapter of the diocese as well as by the bishop (*k*). The confirmation might have have been granted after the making of the lease (*l*),—and even after the death of the lessor (*m*); and as regards an augmentation, the patron (it

(*e*) Co. Litt. 44 a.
(*f*) (1596), 2 Rep. 39; (1598), 3 Rep. 75; (1613), 10 Rep. 60a.
(*g*) *Cf.* Incumb. 371.
(*h*) (1546), Dy. 61 b, 106 b, 204 b, 356 a, 356 b; Co. Litt. 306 b, 329, 343 b; Degge, 120; (1662), 1 Sid. 75.
(*i*) 1 Roll. Abr. 481; (1567), Dy. 273.
(*k*) Co. Litt. 300 b.
(*l*) *Ibid.*
(*m*) *Newcomen's Case* (1601), 5 Rep. 15 b; *Banister's Case* (1626), Cro. Car. 38.

should be mentioned) consists of the patron paramount and of the rector as immediate patron (*n*).

(iii.) Leases and other alienations, by statute.

(*a.*) UNDER THE OLD STATUTES.

Sales and leases of church-lands,—now controlled by statute.

It has been said, that a bishop (including an archbishop) has the whole fee vested in him,—and that an incumbent, whether rector or vicar, has but a qualified fee (*o*) ; but, at the present day and for all practical purposes, each of them has but an estate for his life, determinable upon his ceasing to be bishop or incumbent (*p*) ; and whatever the true nature of his estate, his sales and leases or other dispositions of the possessions of his dignity or benefice are now regulated by divers statutes, and the provisions of these statutes have to be complied with.

The old statutes,—enumeration of.

The old statutes applicable to the matter, and which have commonly been called the enabling or disabling (and sometimes the restraining) statutes, are the following, namely :—the statute 32 Hen. 8, c. 28, and the statutes 1 Eliz. c. 19, and 13 Eliz. c. 10 (as amended by the 14 Eliz. c. 11, the 18 Eliz. c. 11, and the 6 & 7 Will. 4, cc. 20, 64). And the statutes of a more modern date are the following, namely :—the 2 & 3 Vict. c. 49 ; 5 & 6 Vict. cc. 27, 108 ; 14 & 15 Vict. c. 104 ; 17 & 18 Vict. c. 116 ; 21 & 22 Vict. c. 57 ; 23 & 24 Vict. c. 124 ; 24 & 25 Vict. c. 105 ; 25 & 26 Vict. c. 52 ; 31 & 32 Vict. c. 114 ; and 51 & 52 Vict. c. 20.

The new statutes,—enumeration of.

The old statutes,—effect of.

The effect of the old statutes (which contain nothing that is expressly applicable to mines) may be stated very shortly as follows :—By the 32 Hen. 8, c. 28, the leases of persons seised in fee simple "*in right of their churches*" were made as valid as the leases of persons seised for the absolute fee simple estate (s. 1),—provided the leases were of lands usually letten (*q*), and were at the old accustomed rents (*r*), and for terms not exceeding twenty-one years, or three lives, and were impeachable for waste (s. 2) ; but the leasing powers of parsons and vicars were expressly left untouched by the Act (s. 4),—so that (in

(*n*) Bac. Abr. Lease (G.), 2 ; *Doe* d. *Bramwell* v. *Collinge* (1849), 7 C. B. 939 ; 18 L. J. (N.S.) C. P. 305.

(*o*) Bac. Abr. (H.) 120 ; *Knight* v. *Moseley* (1753), Amb. 175.

(*p*) *Magdalen Hospital* v. *Knotts* (1876), 5 Ch. D. 175.

(*q*) *Pemble* v. *Sterne* (1668), Raym. 165 ; 1 Lev. 212 ; 1 Sid. 416 ; *Doe* v. *Yarborough* (1822), 1 Bing. 24.

(*r*) *Threadneedle* v. *Lynam* (1675), 1 Mod. 203 ; 2 Mod. 57 ; 1 Freem. 92, 179 ; Co. Litt. 44 b.

effect) the Act extended (so far as regards church lands) to the lands of archbishops and bishops only.

By the statute 1 Eliz. c. 19, s. 5, all conveyances of church lands (not being such leases as aforesaid) made by archbishops or bishops were declared void ; and by the statute 13 Eliz. c. 10, s. 3, all conveyances (including leases) of church lands made [by the masters and fellows of any college, or] by deans and chapters of cathedral or collegiate churches [or by the masters or guardians of any hospital], or by any parsons, vicars, or other incumbents of any ecclesiastical living,— save only leases not exceeding twenty-one years or three lives upon which the old accustomed yearly rent was reserved,—were declared utterly void ; but (by the 14 Eliz. c. 11) these restrictions were declared not to extend to any houses within towns (or to the lands held with such houses),—and regarding all these latter, leases for terms not exceeding forty years were authorised ; but by the 18 Eliz. c. 11, the provisions of the 13 Eliz. c. 10, were required to be strictly observed ; and the 6 & 7 Will. 4, c. 20, contained the like provision for the strict observance of these provisions.

Void and voidable,—when a lease is voidable only, although declared void ;

But it is to be remembered, that when a statute declares a conveyance to be void,—and the question arises whether the conveyance is void or is only voidable,—it is necessary to have regard to the intent of the statute (*s*). And accordingly, when that intent is regarded, the conveyance (*e.g.*, the lease) may be voidable only,—as has been held to be the case with the leases granted by bishops, rectors, etc., of church lands, in contravention of the 32 Hen. 8, c. 28 (*t*), or in contravention of the 13 Eliz. c. 10 (*u*). Or the lease may be simply and utterly void,—as has been held to be the case with leases of church lands made by an ecclesiastical corporation without a head (*x*),—and, generally, in the case of all charity lands (*y*), including college lands (*z*). And according as the lease is voidable or is void, the following distinction is to be taken upon the operation of the statute of limitations, namely,—(1) that where the lease is void, then after twelve years possession by the lessee, the Attorney-General is

and when it is void really.

Title by adverse possession,—accrual of, according as lease is voidable only, or is really void.

(*s*) *Lincoln College Case* (1616), 3 Rep. 60 a.

(*t*) 4 Bac. Abr. 761 ; Co. Litt. 45a.

(*u*) *Pennington* v. *Cardale* (1858), 3 H. & N. 656.

(*x*) *Southwell Collegiate Church Case* (1675), 1 Mod. 204; 2 Mod. 56.

(*y*) *Magdalen Hospital* v. *Knotts* (1876), 5 Ch. D. 175 ; 8 Ch. D. 709 ; 4 App. Cas. 324.

(*z*) *Magdalen College Case* (1615), 11 Rep. 76c.

barred from impeaching the lease (*a*),—and the title of the person entitled under the void lease becomes an absolute fee simple title (*b*) ; but (2) where the lease is voidable only, the twelve years would run only as from its avoidance,—there being no right of entry until then.

Voidable lease,—might have been confirmed by the successor;

At the time when the matter was regulated only by the old statutes, a lease granted by any rector or vicar, archbishop or bishop, and which was not in accordance with the statutes, was good during the life (or incumbency) of the lessor,—being sometimes void against, and sometimes only voidable by, his successor,—who might have confirmed the voidable lease. But a lease which was void *in se* could not be so confirmed (*c*),—the acceptance of rent by the successor only creating a tenancy from year to year (*d*) ; and under the modern statutes, any lease that was unauthorised would be void, *semble*.

and was usually valid during the life of the head of the corporation.

And just as, while the old statutes only were in force, the lease of a rector or vicar, archbishop or bishop, not made in accordance with the provisions of these Acts, was valid during the life (and incumbency) of the lessor (*e*), so the like unauthorised leases, if made by a dean and chapter (or generally by a corporation aggregate which had a head), were valid during the life (and incumbency) of the head of the lessor-corporation (*f*) ; but under the provisions of the modern statutes, that would, *semble*, no longer be so.

Voidable lease,—might become good, by lapse of time.

A lease which was not made in compliance with the provisions of the old statutes would not have been supported in equity, on the ground of any valuable consideration moving from the lessee (*g*) ; however, where the right to impeach the lease or other alienation is (so far as appears) only a right in equity to set aside the transaction, and that right is not exercised within twenty years from the date of the transaction, the lease (or other alienation) will become unimpeachable and therefore good (*h*).

Sub-division of tenement, —and appor-

Some question having been made as to the validity of dividing the old accustomed rent, or making a lease of the old tenement

(*a*) *Att.-Gen.* v. *Magdalen College* (1857), 6 H. L. Cas. 189 ; *Att.-Gen.* v. *Payne* (1859), 27 Beav. 168 ; *Att.-Gen.* v. *Davey* (1859), 4 De G. & J. 136.

(*b*) *Magdalen Hospital* v. *Knotts* (1876), 4 App. Cas. 324.

(*c*) *Doe* v. *Bridger* (1831), 1 B. & Ad. 847.

(*d*) *Doe* d. *Bramwell* v. *Collinge* (1849), 7 C. B. 939 ; 18 L. J. C. P. 305.

(*e*) *Bishop of Salisbury's Case* (1613), 10 Rep. 58 b, 60 b ; *Doe* v. *Yarborough* (1822), 7 Moo. 258 ; 1 Bing. 24.

(*f*) Co. Litt. 45 a ; *Pennington* v. *Cardale* (1858), 3 H. & N. 656 ; 27 L. J. Exch. 438 ; *Doe* v. *Taniere* (1848), 12 Q. B. 998 ; 18 L. J. Q. B. 49.

(*g*) 1 Roll. Abr. 379, pl. 6 ; 2 Burr. 1146 ; 2 Freem. 224.

(*h*) *Att.-Gen.* v. *Magdalen College, Oxford* (1857), 6 H. L. Cas. 189.

in parts,—*i.e.*, of making separate leases of the tenement in parts,—it was, by the 39 & 40 Geo. 3, c. 41, enacted, that the several rents on the separate demises should be taken to be the ancient rents within the meaning of the statutes, provided that the aggregate rents were not less than the accustomed rent, and were each proportioned to the value of the property demised.

Apportionment of ancient rent.

An estate granted by copy, although it was expressed to be for life, or for a life or lives, was yet but an estate at will; and a re-grant of the copyhold tenement at the old accustomed rent was therefore deemed to be authorised by the statute 13 Eliz. c. 10 (*i*),—but under the statute 24 & 25 Vict. c. 105, to be presently mentioned, no such re-grant could now be made, —save when there was a right of renewal in the grantee.

Copyhold tenement,—re-grant of.

Also, under the statute 1 Eliz. c. 19, concurrent leases (*k*) as distinguished from leases in reversion (*l*) were permitted; but by the 6 & 7 Will. 4, cc. 23, 64, the grant of concurrent leases was restrained; and under the 24 & 25 Vict. c. 105, the concurrent leases so restrained became forbidden altogether.

Concurrent and reversionary leases.

(*b.*) Under the Modern Statutes.

The provisions of the modern statutes, and especially such of them as are applicable to mines, require to be stated with some particularity :—

And firstly, as regards augmentations (that is to say, poor livings which have received an augmentation from the governors of Queen Anne's bounty), it is provided by the 2 & 3 Vict. c. 49 (by which statute every augmented living is created a perpetual curacy), that the perpetual curate (or the parson or vicar), with the consent of the governors of Queen Anne's bounty, and of the patron, and of the ordinary (as regards any lands situate outside the parish), and with the further consent of the archbishop (as regards any lands situate within the parish), may (by ss. 15, 16) sell the said lands,—the sale-proceeds being paid to the governors for behoof of the living.

Poor livings, augmentation of,—sales of.

(*i*) *Dean and Chapter of Worcester's Case* (1605), 6 Rep. 37 a; *Rowden* v. *Malster* (1626), Cro. Car. 44; Gilb. Ten. 129, 185.

(*k*) *Fox* v. *Collyer* (1382), And. 65, pl. 140; Mo. 107, pl. 251; Bridg. by Ban. 596; *Evans* v. *Ascuith* (1627), *ibid.* 610; *Lepur* v. *Wroth* (1585), 1 Leon. 35; *Grindall's Case* (1585), 4 Leon. 78.

(*l*) (1662), Bridg. by Ban. 136.

Livings generally,—leases of: (1) Under 5 & 6 Vict. c. 27;

and (2) Under 5 & 6 Vict. c. 108.

And secondly, as regards livings generally (and including, apparently, augmented livings), by the 5 & 6 Vict. c. 27, certain powers of leasing were vested in the incumbents of livings, the powers requiring to be exercised with the consent of the patron and of the ordinary; and these powers were additional powers (*m*); but the leases by that Act authorised, were ordinary farming leases only, and required to be impeachable for waste,—so that no mining lease could be granted thereunder. However, by the 5 & 6 Vict. c. 108, much larger powers of leasing have been conferred upon incumbents, the leasing powers to be exercised in all cases with the consent of the Ecclesiastical Commissioners, and with the consent also of the patron, and (in the case of copyhold lands) with the consent of the lord of the manor; and such larger powers of leasing extend to authorising,—(1) By s. 4, the granting of leases of water-leaves and way-leaves (either above ground or underground), for any term not exceeding sixty years; and (2) By s. 5, the confirmation of voidable leases, and the grant of new leases (upon the surrender of the old leases) of any water-leaves or way-leaves, or of any mines; and (3) By s. 6, the granting of any lease (in possession and for a term not exceeding sixty years) of any mines or minerals and mining rights,—upon the terms and conditions to be approved by the Ecclesiastical Commissioners,—besides authorising (by s. 1) building leases, with power to dig take and carry away such clay gravel and sand as it shall be necessary to remove for the purposes of the building; and (by s. 14) a proportion (not exceeding three-fourths and not being less than one-half) of the mine-rents and mining royalties is to be paid to the Ecclesiastical Commissioners; and (by s. 30) no premium is to be taken.

Livings generally,—and episcopal and other dignities,—Sales and leases of, generally. (1) Under 14 & 15 Vict. c. 104:

Also, by the 14 & 15 Vict. c. 104 (commonly called the Ecclesiastical Leasing Act, 1851, and sometimes called the Episcopal and Capitular Estates Act, 1851),—an Act which was at first applicable only to bishops (including archbishops), deans and chapters, deans, and other dignitaries, and not to parsons, vicars, or perpetual curates, but which (by force of the 24 & 25 Vict. c. 105, s. 3) now extends also to parsons, vicars, and perpetual curates,—the ecclesiastical corporation sole or aggregate may (by s. 1), with the approval in writing of the Church Estates Commissioners—either (1) sell to any lessee of the corporation (including the copyhold tenant) the reversion

(*m*) *Green* v. *Jenkins* (1859), 28 Beav. 87; 1 De G. F. & J. 454; 29 L. J. Ch. 505.

(or seignory) in the lands comprised in the lease (or in the copyhold grant),—or (2) purchase from such lessee (or copyholder) the lands comprised in his lease (or copyhold grant) ; and the sale or purchase is completed by an assurance in the form appointed by those Commissioners, and (being confirmed by them) is valid to all intents and purposes (s. 5) ; and under the 17 & 18 Vict. c. 116, there may be such sale or purchase as aforesaid of part only (and of any part) of the land comprised in the lease (or in the copyhold grant),—in which latter case, the residue of the land remains unaffected, the rent being apportioned.

(2) Under 21 & 22 Vict. c. 57 :

And by the 21 & 22 Vict. c. 57 (s. 1) leases and sales of mines (and generally of church lands) may be made in all cases where the lease or sale appears to the Ecclesiastical Commissioners to be desirable. And the lease may be made either with or without any premium, and for such term of years and under and subject to such provisions and conditions as the Ecclesiastical Commissioners think proper,—the lease requiring, however, the consent of the patron of the living. And the sale is to be made with the like consent, and also after one calendar month's (formerly three calendar months') notice to the bishop (*n*) ; but no sale under this Act is to be made of lands which (at the date of the commencement of the Act) could otherwise be sold under the 14 & 15 Vict. c. 104, the provisions of which have been already set forth ; but otherwise the powers of the Act are cumulative (s. 7).

(3) Under 24 & 25 Vict. c. 105.

And by the 24 & 25 Vict. c. 105, s. 1, rectors, vicars, and perpetual curates (other than the then existing incumbents) are required in all future leases of the church lands to comply with (and not by any subterfuge to evade) (*o*) the provisions as to leasing contained in the 5 & 6 Vict. cc. 27, 108, and 21 & 22 Vict. c. 57; but rights of renewal under or in respect of any then existing leases are left unaffected (s. 2) ; and (by s. 3) all rectors, vicars, and perpetual curates or other incumbents (including prebendaries in respect of their non-cathedral preferments) (*p*) are authorised to sell their estates under the powers contained in the 5 & 6 Vict. c. 108, or in the 14 & 15 Vict. c. 104, or in the 21 & 22 Vict. c. 57, the provisions of all which Acts have been already stated.

Church lands re-assigned to any

And by the 23 & 24 Vict. c. 124, by which, upon the first avoidance of any see (whether of an archbishop or bishop) in

(*n*) 51 & 52 Vict. c. 20, s. 11.

(*o*) 25 & 26 Vict. c. 52, s 1.

(*p*) *Ibid.* s. 2.

see,—leases of, and of mines under.

England, after August 28th, 1860, the lands of the see are made to vest in the Ecclesiastical Commissioners (s. 2), and other lands (comprising or not portions of the former lands of the see) are directed to be assigned to the see (s. 3), it is enacted (by s. 8), that all ordinary leases of the lands so assigned shall be such as the 5 & 6 Vict. c. 27 (in the case of rectors and vicars) authorises ; but that mining leases may, with the approval of the estates committee of the Ecclesiastical Commissioners, be granted by the archbishop or bishop, for such term and at such rent and under such conditions as the estates committee shall think fit, a portion of the mining rent being paid to the Ecclesiastical Commissioners ; and these provisions appear to extend to authorising a renewal (or extension) of existing mining leases (s. 22).

Church lands, re-assigned to any dean and chapter, —leases of, and of mines under.

Under the statute 31 & 32 Vict. c. 114, ss. 3, 6, the estates of deans and chapters (and, by s. 13, those of canons also) may be vested in the Ecclesiastical Commissioners,—under a scheme of the Ecclesiastical Commissioners, made with the consent of the dean and chapter and of the visitor of the dean and chapter, and sanctioned by an order of the Queen in council ; and other lands may be vested in (that is to say, assigned or re-assigned to) the dean and chapter in lieu of any annual sum payable to them by the Ecclesiastical Commissioners ; and as regards any lands so re-assigned, all future ordinary leases thereof are to comply with the provisions as to leasing contained in the 5 & 6 Vict. c. 27 ; but otherwise all the provisions, as to leasing (*e.g.*, mines) and as to selling, the church lands, which are contained in the 5 & 6 Vict. c. 108 and 21 & 22 Vict. c. 57, are to remain applicable (s. 11) ; and any proceedings then pending or thereafter to be commenced for a sale under the 14 & 15 Vict. c. 104 may be completed by the Church Estates Commissioners ; and in case they refuse to complete any such sale, the lessee (or copyholder) may insist on the Ecclesiastical Commissioners purchasing his interest (s. 10) (*q*).

Church lands, vested in Ecclesiastical Commissioners,—leases and sales of.

As regards the Ecclesiastical Commissioners themselves, and the estates vested in them, they may make whatever leases thereof they may think proper (including mining leases) ; and they may also make sales of such estates or of any part thereof ; but (as regards their sales) the 6 & 7 Vict. c. 37, s. 3, having created in favour of the governors of Queen Anne's bounty

(*q*) 23 & 24 Vict. c. 124, s. 24.

a charge for 600,000*l.* on all the lands vested in the Ecclesiastical Commissioners, no sale of the lands so charged can (while such charge continues) be made by the Ecclesiastical Commissioners, save under a scheme which has been sanctioned by an order in council (s. 8),—unless, *semble*, other lands are immediately purchased with the sale-moneys, and so subjected to the charge in the place of those aliened (s. 6).

Glebe Lands Act, 1888,—sales of church lands under,—mines not to be included, in general.

Under the 51 & 52 Vict. c. 20 (commonly called the Glebe Lands Act, 1888), the incumbent of any living may, upon notice of his intention in that behalf given to the bishop, to the patron, and to the mortgagees (if any) of the living, and with the approval of the Board of Agriculture, sell the glebe land (other than the parsonage thereon),—the sale-proceeds being made applicable for the benefit of the living; and in completion of the sale, the incumbent is (by s. 8 (4)) authorised to convey the land as if he were a tenant for life in possession under the Settled Land Act, 1882 (*r*); but (by s. 5 (2)) the Board are not to approve the proposed sale of any mines or minerals within or under the glebe, when these are (or are likely to become) of any considerable value.

It appears, therefore, that (so far as regards sales and leases of mines within and under church lands) the result of all these provisions of the modern statutes is this, namely,—

General results of the provisions of the modern statutes,—as to *leases* of church lands, and of the mines therein.

Firstly, as regards Mining Leases:—Rectors, vicars, and perpetual curates may, under the 5 & 6 Vict. c. 108, grant leases, with the consent of the Ecclesiastical Commissioners and with the consent also of the patron, for a term not exceeding sixty years,—a proportion of the rents and royalties being made payable to the Ecclesiastical Commissioners; and (under the 21 & 22 Vict. c. 57) a premium may be taken, and the lease may be for any length of time. And archbishops or bishops (as to lands re-assigned to them by the Ecclesiastical Commissioners) may, under 23 & 24 Vict. c. 124, grant leases, with the approval of the Church Estates Commissioners, and for any term and subject to any conditions which these commissioners approve. And deans and chapters, and also canons,—(as to lands re-assigned to them by the Ecclesiastical Commissioners),—may, under the 31 & 32 Vict. c. 114, grant leases,—with the consent of the Ecclesiastical Commissioners, for a term not exceeding sixty years,—a proportion of the rents and royalties being made payable to the Ecclesiastical Commissioners,—and (under the

(*r*) 45 & 46 Vict. c. 38, s. 20.

21 & 22 Vict. c. 57) a premium may be taken, and the term may be for any length of time. And, lastly, the Ecclesiastical Commissioners (as to any lands whatsoever vested in them) may grant whatever mining leases they think fit, and merely under the Acts relating to the Commissioners.

General results of the provisions of the modern statutes,—as to *sales* of church lands, and of the mines therein.

And, Secondly, as regards Sales of Mines:—The incumbents of augmented livings may, under the 2 & 3 Vict. c. 49, sell, with the consent of the governors of Queen Anne's bounty, and of the patron and of the ordinary, the consent of the archbishop being also sometimes required: and all incumbents (including the incumbents of augmented livings) may, under the 21 & 22 Vict. c. 57, sell, with the approval of the Ecclesiastical Commissioners, and with the consent of the patron, one calendar month's notice being given to the bishop. Also, *semble*, if the sale is made to their own lessee or copyholder, it may, by force of the 24 & 25 Vict. c. 105, be made under the 14 & 15 Vict. c. 104, with the approval of the Church Estates Commissioners. But although, under the 51 & 52 Vict. c. 20, all such incumbents may, with the approval of the Board of Agriculture, and on notice to the patron and to the bishop, and to the mortgagees (if any) of the living, sell their glebe lands, yet they may not sell the mines unless these are of no value. And archbishops and bishops (as regards lands re-assigned to them by the Ecclesiastical Commissioners) may, *semble*, sell under the 14 & 15 Vict. c. 104,—but only to their own lessees or copyholders, and with the approval of the Church Estates Commissioners. And deans and chapters (as regards lands re-assigned to them by the Ecclesiastical Commissioners) may, *semble*, sell under the 31 & 32 Vict. c. 114 to their own lessees or copyholders, with the approval of the Church Estates Commissioners; and deans and chapters, and also canons, (as regards such last-mentioned lands,) may sell, under the 31 & 32 Vict. c. 114, to any purchaser whatever with the approval of the Ecclesiastical Commissioners. And the Ecclesiastical Commissioners themselves (as regards all lands vested in them) may sell as they think fit, and merely under the Acts relating to the Commissioners.

LAND TAX REDEMPTION ACT, 1799,—PROVISIONS OF.

Land Tax Redemption Act, 1799,—on a sale of

By the Land Tax Redemption Act, 1799 (*s*), s. 12, it is enacted, that no mines, or minerals, or seams, or veins of coal, metals, or other profits of the like nature, belonging to any

(*s*) 39 Geo. 3, c. 21.

manors, messuages, lands, tenements, or hereditaments, which shall be sold by any bishop or other ecclesiastical corporation for the purpose of redeeming any land tax, whether the same shall be opened or unopened,—nor any right, title, or claim to open or work the same,—shall pass by any conveyance of such manors, messuages, lands, tenements, or hereditaments, either by express or general words in such conveyance; and such mines or minerals, seams or veins of coal, metals, or other profits, shall be always absolutely excepted and reserved to such bishop or other ecclesiastical corporation as fully and effectually to all intents and purposes as if the same were in such conveyance expressly excepted and reserved.

church lands under, the mines are to be excepted.

In *Wilson* v. *Grey* (*t*), where the rector of H., for the purpose of redeeming the land tax on the glebe, sold and conveyed a piece of the glebe (which contained minerals) to M.,—the sale being made before the Land Tax Redemption Act, 1799, came into force, but the conveyance being executed after that Act had come into force; and a subsequent rector of H. entered into an agreement for letting the mines within and under the piece of glebe which had been sold and conveyed to M., alleging that (by force of the Act of 1799) these mines had been excepted out of the sale and conveyance to M.,—the court said, that the Act did not affect the sale, being prospective only, and not retrospective; and the court declared the plaintiffs (who claimed under M.) entitled to the mines and minerals, and also declared the agreement for letting entered into by the subsequent rector to be void as against the plaintiffs.

Land Tax Redemption Act, 1799,—was not retrospective.

In *Whidborne* v. *Ecclesiastical Commissioners* (*u*), where immediately after the Land Tax Redemption Act, 1799, had been passed, the incumbent (a prebendary) had for the purposes and under the provisions of that Act sold certain church lands, with an *express* exception of the pipe-clay and potters' clay in the lands (save within twenty perches of certain buildings on the lands sold), and with an *express* reservation of working and getting the clay (save within the twenty perches aforesaid),—the court held, that the exception out of the exception was contrary to the Act, and was therefore void; and it was not covered by the 57 Geo. 3, c. 100, only informalities in sales under the Land Tax Redemption Act, 1799, being covered by that Act, but not sales of hereditaments (*e.g.*, mines) which the Act expressly prohibited the sale of.

Land Tax Redemption Act, 1799,—the provisions of, are peremptory.

(*t*) (1866), L. R. 3 Eq. 117. (*u*) (1877), 7 Ch. D. 375.

LIABILITY OF PRECEDING VICAR, OR OF HIS ESTATE, TO SUCCEEDING VICAR.

Liability,—principle of.

Where A. was vicar, and through his neglect of repairs the buildings and fences on the glebe were dilapidated at his death; and B. succeeded him as vicar, but died before recovering for the dilapidations against A.'s executors, and leaving those dilapidations still existing: and C., the next succeeding vicar, recovered the amount of the dilapidations against B.'s executors, it was held, that B.'s executors could recover over against the executors of A.

Liability,—limit of, to acts and neglects of self.

In *Ross* v. *Adcock* (*x*), where certain gravel pits in land adjoining the glebe had been lawfully opened by the surveyor of highways, and the surveyor had insensibly and wrongfully encroached on the glebe and dug gravel and sand thereout also,—and the successive incumbents during whose times the encroachments had been made, had not known that they were encroachments,—and a subsequent rector proceeded against the executors of the last preceding rector in respect of the gravel so wrongfully dug and taken away by the surveyors, pretending that the last preceding rector was liable therefor, and also for not filling up the pits and holes in the glebe, and restoring the surface,—the court said, that the executors were not liable as for dilapidations, either for the gravel dug in the last preceding rector's time, or for his not having filled up the pits and holes,—and *à fortiori*, they were not liable for gravel and sand dug and taken away before his time.

SECTION II.—*Charity Lands.*

CHARITIES, GENERALLY.

Charity lands,—leases of, and sales of, valid, if beneficial for charity.

In *Attorney-General* v. *Stamford* (*Corporation*) (*a*), the court said, that where charity trustees have general powers of leasing, they may, in the exercise of these powers, create whatever leases they think most beneficial for the charity,—even taking a fine or premium, but not inserting any provision for their own personal benefit; and the court established the charity, and directed an enquiry as to the best mode of leasing the charity lands in future. Also, in *Attorney-General* v. *Warren* (*b*), the court allowed that charity trustees might sell or absolutely

(*x*) (1869), L. R. 3 C. P. 655.
(*a*) (1747), 2 Sw. 591.
(*b*) 1818), 2 Sw. 291; *Att.-Gen.* v. *York* (*Archbishop*) (1853), 17 Beav. 495.

aliene the charity lands, provided the sale was a beneficial one for the charity. And the court was in the habit of sanctioning such a sale ; and in *Attorney-General* v. *Cross* (*c*), a sale in the form of a lease for three lives, was so sanctioned,—there being nothing contrary to law in that ; and, of course, in all these cases, if the law had forbidden the lease or sale, the sanction of the court would not have got over that difficulty (*d*).

Charity lands,—leases of, now require sanction of Charity Commissioners ;

By the 16 & 17 Vict. c. 137, s. 21, if the trustees of any charity think it would be beneficial to the charity to grant a lease of the mines and minerals (including the stone, clay, or gravel) within or under the lands of the charity, they may (with the sanction of the Charity Commissioners) grant such lease ; and by the 18 & 19 Vict. c. 124, s. 39, these Commissioners may prepare and approve a general scheme for the leasing of the lands of the charity ; and, of course, any leases granted pursuant to such scheme will be valid.

and otherwise are void altogether.

By the 18 & 19 Vict. c. 124, s. 29, any charity lease which is not granted with the approval of the Commissioners, or pursuant to a scheme of the Commissioners, is void,—that is to say, it is void simply, and not voidable (*e*) ; but that provision does not extend to any charity lease granted pursuant to any Act of Parliament, or which has been approved by the court ; and the section is not retrospective (*f*).

CHARITIES BEING HOSPITALS.

Charities being hospitals,—leases of lands of.

By the statute 14 Eliz. c. 14, all conveyances (including leases) of the property of hospitals (or of rectors, vicars, and the like) save leases for twenty-one years or three lives made in conformity with the 13 Eliz. c. 10, were declared utterly void,—a provision which, by the 39 Eliz. c. 5, was (in effect) extended to all hospitals whatsoever founded and incorporated by private persons ; and all conveyances in evasion of the provisions of the Act were also effectively checked thereby.

CHARITIES BEING COLLEGES.

Colleges,—leases of lands of.
(1) Anciently :

By the 13 Eliz. c. 10, all conveyances (including leases) of college lands,—other than leases for twenty-years or three lives

(*c*) (1817), 3 Mer. 524 ; and see *In re Cross's Charity* (1859), 27 Beav. 592.
(*d*) *Watson* v. *Hemsworth Hospital* (1807), 14 Ves. 324.
(*e*) *Bangor* (*Bishop*) v. *Parry*, [1891] 2 Q. B. 277.
(*f*) *Moore* v. *Clench* (1876), 1 Ch. D. 447.

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at the old accustomed rent,—were declared utterly void ; and by the 18 Eliz. c. 6, but only as regards the colleges within the two Universities of Oxford and Cambridge, and the colleges of Eton and Winchester, the college lands were not to be let for any term of years, or upon or for any lives, unless one full third part at the least of the old accustomed rent was reserved.

(2) Under 21 & 22 Vict. c. 44,—of mines and of wayleaves ;

However,—but only as regards lands belonging to the colleges of Eton and Winchester, or to any of the colleges within the Universities of Oxford, Cambridge, and Durham,—it was provided, by the 21 & 22 Vict. c. 44, as regards mines and minerals, as follows, that is to say :—By s. 15, that leases of (or licenses to get) gravel and sand, or brick-earth, might be granted by the college, on such terms and for such considerations as the college should think fit ; and by s. 19, water-leaves and way-leaves for any term not exceeding sixty years in possession might be in like manner granted ; and by s. 11, any building lessees of the college might dig and carry away, and dispose of, any gravel or sand or brick-earth necessarily gotten in connection with the building operations. And by s. 20, the college might also execute a lease of the mines and minerals,—and that either with or without the surface,—and with all the usual or convenient mining rights (including a right of working by outstroke, or, *semble*, by instroke) ; the lease requiring to be at the best rent or royalty obtainable, and to be for a term not exceeding sixty years in possession, and no fine or premium to be taken ; and the lease to be otherwise according to the custom of the district in which the mines lie.

and of mines generally, with or without the surface.

College lands,—sales of,— (1) Under 21 & 22 Vict. c. 44 ;

And the college might also (with the consent of the Board of Agriculture) sell to anyone (s. 1) or sell and enfranchise to its own lessees (ss. 1, 4) or copyholders (s. 32) any of the college lands, or purchase up the interests of its lessees (or copyholders) (s. 6).

(2) And now under 61 & 62 Vict. c. 55.

But all these provisions have been now superseded, and (in fact) repealed, by the Universities and Colleges Estates Act, 1898 (*g*) ; and it is now prescribed by the last mentioned Act, that the specified universities and colleges may, for the purposes of any sale or enfranchisement (exchange, partition), or leasing of the charity lands, exercise any of the powers of a tenant for life under the Settled Land Acts, 1882 to 1890,—sales and enfranchisements requiring for their validity that the Board of

(*g*) 61 & 62 Vict. c. 55.

Agriculture shall consent thereto ; and the university or college is to be deemed the tenant for life, and the Board of Agriculture are to be deemed the trustees of the settlement.

SECTION III.—*Municipal Lands, etc.*

Parish land, —ownership of.

By the 59 Geo. 3, c. 12, s. 17, the parish property was made to vest in the churchwardens and overseers of the poor as a body corporate (*h*); but, *nota bene*, not in the churchwardens alone (*i*), or in the overseers alone. And now, under the 56 & 57 Vict. c. 73, s. 5, whereby the churchwardens are superseded (save as regards the church) by additional overseers, the parish property (as regards all rural parishes to which the Act is applicable) is now vested in the parish council,—*scil.*, the property of the parish in its own right, and also trust property theretofore held by the churchwardens and overseers (other than church property or church charity property).

Parish land, —leases and sales of, with sanction of Local Government Board.

And (by s. 6) the parish council, as regards the property so vested in it, is to sell and let it with the sanction of the Local Government Board or (as regards charities) with the approval of the Charity Commissioners. And (by s. 9), the parish council is authorised to acquire and hold lands by agreement, and also (subject to certain formalities being observed) to acquire lands compulsorily under the provisions of the Lands Clauses Consolidation Act, 1845,—and apparently, therefore, the parish council may acquire the mines and minerals (*k*),—although these will usually be excepted out of any conveyance of the lands to that council. But as regards lands which the parish council may (under s. 10) hire for allotments, it may not compulsorily hire any mines or minerals ; and where it hires lands by agreement, it acquires no right thereby to dig or carry away for sale any gravel or sand, or any clay, in the allotment ; and the landowner may (at his pleasure) resume the land, when he wants it in order to work the mines and minerals, or to get the gravel and sand or clay.

Parish council, allotments by,—mines and minerals excepted.

Local sanitary authorities,—not, in general, owners of the mines within their lands.

A local board (or other like authority which is entrusted with the execution of the provisions of the Public Health Act, 1875) (*l*), may, under s. 176 of that Act, acquire lands by agreement under the Lands Clauses Consolidation Act, 1845,

(*h*) *Woodcock* v. *Gibson* (1825), 4 B. & C. 462.
(*i*) *Phillips* v. *Pearce* (1826), 5 B. & C. 433.
(*k*) *Errington* v. *Metropolitan Rail. Co.* (1882), 19 Ch. D. 559.
(*l*) 38 & 39 Vict. c. 55.

or (subject to procuring the approval of the Local Government Board) under the compulsory provisions of that Act; and no doubt mines and minerals may be, but will not in general be, acquired upon such a purchase; and under s. 175 of the Public Health Act, 1875, all such lands becoming superfluous are to be sold, unless the Local Government Board shall authorise their retention; and in the meantime all lands not immediately required may, under s. 177, be let for any term of years, but only with the consent of the Local Government Board.

Town councils, lands of,—leases and sales of, with sanction of Treasury, or (now) of Local Government Board.

Under the Municipal Corporations Act, 1882 (*m*), any municipal corporation may, by s. 107, acquire and hold land, with the approval of Her Majesty's Treasury,—the provisions of the Lands Clauses Consolidation Act, 1845, being thereby made applicable to all such purchases; and (by ss. 108, 109), the town council may, with the approval of the Treasury (or, now, of the Local Government Board (*n*), sell or let the corporate property, —such approval not being required, of course, when the lease or sale is made pursuant to any Act of Parliament, and not being required for any ordinary lease not exceeding thirty-one years, or for any building lease not exceeding seventy-five years; and (by s. 110) the council may also renew leases under any covenant for renewal or custom to renew which is binding on the corporation,—all the foregoing provisions having reference to the property of the corporation in its own right, and not to any property of which the corporation (or the officials of the corporation) are trustees holding upon trust for any charity, college, or the like (ss. 133—135).

County council, lands of,—sales and leases of.

Under the Local Government Act, 1888 (*o*), s. 64, the public property of the county vests in the county council, and that council may, with the consent of the Local Government Board, alienate such property (by sale or lease). The county council may also (by s. 65) acquire lands, like any local sanitary authority, under the Public Health Act, 1875, ss. 176—178, the provisions of which have just been stated.

(*m*) 45 & 46 Vict. c. 50, re-enacting the like provisions contained in 5 & 6 Will. 4, c. 76, ss. 94—96.

(*n*) 51 & 52 Vict. c. 41, s. 72.

(*o*) 51 & 52 Vict. c. 41.

CHAPTER V.

RAILWAYS, WATERWORKS, CANALS, AND HIGHWAYS:

MINES UNDER AND ADJOINING.

SECTION I.—*Lands Clauses Consolidation Act*, 1845,— *Provisions of.*

LANDS GENERALLY.

Lands Clauses Consolidation Act, 1845,— provisions of, as regards mines and minerals.

WHERE any lands are taken under the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), then (by s. 63), in estimating the purchase money or compensation, regard is to be had not only to the value of the land taken, but also to the damage (if any) sustained by the owner of the land,—by reason of the severing of the land taken from the other lands of the same owner or by reason of the injurious affection of such other lands; and it has been held upon that provision, that where any land is taken and other land of the same owner is severed or injuriously affected, then every species of damage is to be included (*a*),—although where no land at all of A. is taken, but A.'s land is merely injuriously affected, only such damage is recoverable against the railway company as would be recoverable against any other wrongdoer (*b*).

Injurious affection,— according as some land of same owner is taken or not.

Incidental damage,— compensation for.

By s. 68, if any party shall be entitled to any compensation in respect of any lands (that is to say, in respect either of surface lands or of the mines and minerals) (*c*), or in respect of any interest in lands (or in mines and minerals), which shall have been taken for (*d*), or injuriously affected by (*e*), the execution of the works,—being compensation not otherwise specifically provided for (*f*),—and the compensation claimed

(*a*) *Buccleuch* (*Duke*) v. *Metropolitan Board of Works* (1872), L. R. 5 H. L. Cas. 418.

(*b*) *Hammersmith Rail. Co.* v. *Brand* (1868), L. R. 4 H. L. Cas. 171; *City of Glasgow Rail. Co.* v. *Hunter* (1870), L. R. 2 H. L. Sc. 78.

(*c*) *Errington* v. *Metropolitan District Rail. Co.* (1882), 19 Ch. D. 559.

(*d*) *Rickett* v. *Metropolitan Rail. Co.* (1865), 5 B. & S. 156.

(*e*) *Buccleuch* (*Duke*) v. *Metropolitan Board of Works* (1872), L. R. 5 H. L. Cas. 418.

(*f*) *Scil.*, under Lands Clauses Consolidation Act, 1845, ss. 6—15 (voluntary), ss. 16—67 (compulsory); or under the special Act; or otherwise.

exceeds 50*l.*, the amount thereof (being first ascertained either by arbitration or by a jury,—*scil.*, when it is not agreed) may be recovered by action; but, of course, unless the lands are either *actually* taken or are *actually* affected injuriously, the amount is not recoverable (*g*).

Entry,—before compensation is paid.

By s. 84, the land taken must not (without the consent of the owner) be entered upon, unless and until the purchase money or compensation is paid (*h*),—but surveying and the like operations on the land may be made, paying for the temporary damage; but by s. 85, the purchase money or compensation being first duly secured by deposit in the bank accompanied by a bond with two sureties, the land taken may be entered upon,—*scil.*, for the purposes authorised by the special Act only, and it being always understood that the due subsequent proceedings for the acquisition of the land shall be taken (*i*); and such right of premature entry upon the land taken is only to be exercised when the circumstances require it (*k*).

Mines,—express exception of, necessary.

And, *semble*, in all cases of lands taken under the foregoing provisions, the mines (if intended to be excepted) must be expressly excepted,—unless the special Act supplies the exception.

On taking part, when duty in company to take the whole.

By. s. 92, as regards a house or other building or a manufactory, the whole may be required to be taken, if any part thereof is taken (*l*); also, by s. 93, when any lands (not being lands situate in a town or lands built upon) are so cut through and divided by the land taken, as to leave (either on both sides thereof or on one side thereof) a less quantity than half an acre, the owner may require the whole land to be taken,—*scil.*, unless he have other land adjoining into which the divided or intersected parts may be thrown; and (by s. 94) the divided or intersected parts may be also taken,—*scil.*, if that will be a saving of expense to the company.

COPYHOLD LANDS.

Copyhold lands,—taking of.

And as regards copyhold lands, it is enacted, by s. 96, that within three months after entering on the court rolls the conveyance of the lands to the company, or within one month after

(*g*) *Burkinshaw* v. *Birmingham and Oxford Rail Co.* (1850), 5 Exch. 475.
(*h*) *Wing* v. *Tottenham Rail. Co.* (1868), L. R. 3 Ch. App. 740.
(*i*) *Loosemore* v. *Tiverton Rail. Co.* (1884), 9 App. Cas. 480.
(*k*) *Field* v. *Carnarvon Rail. Co.* (1867), L. R. 5 Eq. 190.
(*l*) *King* v. *Wycombe Rail. Co.* (1860), 28 Beav. 104.

the promoters shall enter upon and use the lands, whichever shall first happen,—or if more than one parcel is taken, then within one month after the last is taken,—the promoters shall procure the whole of the lands so taken to be enfranchised ; and the enfranchisement is thereupon in due course made, the compensation payable to the lord therefor (and which is called the enfranchisement consideration) extending to and comprising everything which the lord loses by the enfranchisement ; and (by s. 97) the enfranchisement vests the purchased copyholds in the company as ordinary freeholds,—so that, *semble*, the company become entitled to the mines and minerals within and under the lands,—*scil.*, unless where the special Act incorporating the Lands Clauses Consolidation Act provides to the contrary.

COMMON LANDS.

Common lands,—taking of.

And as regards common lands, whether being waste lands of a manor or not, and whether (where once parcel of the manor) still remaining parcel of the manor or not, it is by the same Act enacted (*m*), as follows, that it to say ; by s. 99, the right of soil and the common rights are distinguished, and a distinct sum is to be paid for the right of soil (to the lord or other owner of the soil), and a distinct sum is to be paid also to a committee of the commoners on behoof of the commoners ; and (by ss. 100, 107) upon such two distinct sums being paid, the fee simple of the common lands vests in the purchasing company free of the common rights ; and, *semble*, the mines also will vest in the company,—*scil.*, because they are parcel of the soil. Presumably, however, the company and the owner of the soil may agree *inter se*, that the mines shall be left out of the conveyance to the company,—in other words, that the conveyance shall (in the case of a railway company) operate as a purchase under the Railways Clauses Consolidation Act, 1845 (*n*), s. 77 (whereby the mines are impliedly excepted) ; and shall (in the case of a waterworks company) operate as a purchase under the Waterworks Clauses Act, 1847 (*o*), s. 18 (whereby the mines are impliedly excepted).

COMPENSATION, DAMAGE INCLUDED IN.

Amount of purchase money, and

The compensation payable (as and by way of purchase money) on the taking of lands is to be ascertained, in general, separately from the damage (if any) which will be sustained by the owner

(*m*) 8 & 9 Vict. c. 18.
(*n*) *Ibid.* c. 20.
(*o*) 10 & 11 Vict. c. 17.

amount of compensation,—to be separately assessed.

of that land by reason of its severance from his other lands, or by reason of any injurious affection of such other lands (*p*); and the security to be given (under s. 85), where the company enters upon the land before the compensation is ascertained, extends to comprise the aggregate amount of the two sums so ascertained, but not any other sum (*q*).

Subsequent damage,—when to be deemed to have been included in the original compensation.

In *Croft* v. *London and North Western Rail. Co.* (*r*), the plaintiff (or his predecessor in title) had obtained compensation for the lands taken by the company (being an underground layer of earth acquired for the construction of a tunnel), and the compensation expressly included the damage and injury sustained or to be sustained by the construction of the tunnel,—which damage and injury was considered the same thing as the damage by severance and injurious affection within s. 63 of the Lands Clauses Consolidation Act, 1845; and the plaintiff's land overlying the tunnel having subsided, and the houses built on such land having in consequence become ruinous,—which subsidence was traced to the tunnel,—the court held, that the damage by subsidence was damage foreseen at the time of the company's purchase of the lands for the tunnel, and was (and rightly was) included in the original compensation, and could not be recovered subsequently under s. 68 of the Act.

SECTION II.—*Railways,—Mines Under and Adjoining.*

LANDS GENERALLY.

Railways Clauses Consolidation Act, 1845,—provisions of, as regards mines and minerals.

Under s. 6 of the Railways Clauses Consolidation Act, 1845 (*s*), any mines may (under the description of *lands*) be acquired by the railway company on their first purchase of the lands for the railway (*t*); and the compensation then payable will include also the damage by severance to the other mines. But the sections of the Railways Clauses Consolidation Act, 1845, which are specifically applicable to mines are ss. 77—85; and the short effect of the provisions as to mines contained in these sections may be stated as follows:—

Mines,—no express exception of, necessary.

By s. 77, the mines and minerals (unless expressly purchased) are excepted out of the conveyance to the railway company; and (by s. 78) if the mines lying under (or within forty yards

(*p*) 8 & 9 Vict. c. 18, ss. 49, 63.
(*q*) *Ex parte Neath and Brecon Rail. Co.* (1876), 2 Ch. D. 201.
(*r*) (1863), 3 B. & S. 436; 32 L. J. Q. B. 113.
(*s*) 8 & 9 Vict. c. 20.
(*t*) *Smith* v. *Great Western Rail. Co.* (1877), 3 App. Cas. 165.

Mines,—duty of company to subsequently pay for same, if workings are stopped;

or other the prescribed distance from) the railway works are about to be worked, the company is to have thirty days' previous notice of the intention to work them; and the company may (if the working appears to the company likely to damage the railway works) offer (within the thirty days) to buy the mines at a price to be agreed upon, or (failing agreement) to be ascertained by arbitration,—and upon such offer being made, the mines are to be left; but failing such offer, then (by s. 79) the mines may be worked in the usual mode of working mines in the district; but for damage to the railway works occasioned by any improper working of the mines, the company is to be compensated. Or (by s. 80) if by reason of any apprehended injury to the railway the mines are not, in fact, worked, then air-ways and levels (not exceeding eight feet square or other the prescribed limit) may be driven through them for the purpose of working and getting the mines on either side, the company (by s. 81) paying compensation (from time to time) for the loss of the mines left, and for the additional expense of working the mines on either side thereof. And, accordingly, in *Whitehouse* v. *Wolverhampton, etc. Rail. Co.* (*u*), where the plaintiffs were the lessees of certain lands and of the mines thereunder, and they were working and getting the mines; and the defendant company gave notice to take a narrow strip of the surface lands extending right across the whole,—*scil.*, without taking the minerals,—the plaintiffs were held entitled to be paid (as and for the compensation payable by the railway company) not merely the value of their interest in the land taken, but also a further sum for the severance of the lands, and also (and without waiting for the expenses to be incurred) a further sum representing the compensation which is (by s. 81 of the 8 & 9 Vict. c. 20) made payable by the railway company "*from time to time*" on account of (among other things) the "*expenses and losses*" to be incurred by the lessees by reason of "*the continuous working of the mines being interrupted*,"—although such last-mentioned compensation would not, in the general case, be recoverable, until the case had arisen for paying it, under ss. 77—85 of the Railways Clauses Consolidation Act, 1845.

and to pay for injurious affection, if workings not stopped, but continued through air-ways, etc.

LANDS FOR TUNNEL.

Tunnel,—lands taken for.

In *Sparrow* v. *Oxford, etc. Rail. Co.* (*x*), where the railway company had given notice to take portion of the plaintiff's land,

(*u*) (1869), L. R. 5 Exch. 6.

(*x*) (1852), 2 De G. M. & G. 94; 21 L. J. (N.S.) Ch. 731.

and (the land being in the nature of a house) he required the company to take the whole land,—whereupon the company said they would take no part of the land, but would merely construct a tunnel under the land,—the court said, they could not do so. And, apparently, if the company should intend from the first to make a tunnel only, they must acquire the whole surface lands under which the tunnel is to run (*y*),—for the so-called easement of tunnel would confer an exclusive possession of the land occupied by the tunnel.

SUPPORT FOR RAILWAY.

Right of support for railway,—when acquired on the first acquisition of the lands for the railway:

A right of support for the railway may be acquired in the first instance; and in such cases, the right of support is, in fact, included in the original purchase money or compensation. Thus, in *Caledonian Rail. Co.* v. *Sprot* (*z*), where the defendant sold to the plaintiff company a portion of his land which adjoined the railway, and also the land upon which the line of railway was built; and in the purchase deed he reserved the right to work the mines; but the reservation in the purchase deed was made subject to the conditions of a private (or special) Act of the company, whereby it was enacted that it should not be lawful to work that portion of the reserved mines which was under the railway without giving previous notice to the company of the intention to work, and without giving security against damage to the line,—and it appeared that the defendant's mines could not be worked without danger to the line,—the court said, that the conveyance to the company had carried with it (by implication) a right of support to the line,—and the reservation had not taken away (or diminished) such right; and the court treated the matter as one depending entirely on the construction of the purchase deed, and of the relevant provisions in that behalf contained in the special Act; and the court said, that the compensation or purchase price agreed upon on the original purchase included (or ought to have included) a sum in respect of the right of support which was impliedly granted by the conveyance. Also, in *North Eastern Rail. Co.* v. *Elliot* (*a*), where the plaintiff company had under their Act acquired certain surface lands adjoining a river, the mines being excepted; and

(1) *Caledonian Rail. Co.* v. *Sprot.*

(2) *North Eastern Rail. Co.* v. *Elliot.*

(*y*) *Ramsden* v. *Manchester, etc. Rail. Co.* (1848), 1 Exch. 723; and see *Pinchin* v. *London and Blackwall Rail. Co.* (1854), 5 De G. M. & G. 851.

(*z*) (1856), 2 Macq. 449; 1 Paterson, 633.

(*a*) (1860), 1 J. & H. 145; 2 De G. F. & J. 423; 10 H. L. Cas. 16.

the purpose for which the surface lands were acquired was to erect thereon a bridge over the river, and that purpose was notorious ; and it appeared, that, at the date of the purchase, the mines under the land had been abandoned for over forty years, and were full of water,—but the pillars left in the mines, as aided by the pressure of the water against them, were sufficient to support the surface even with the bridge upon it ; and after the bridge had stood for twenty years, the defendant (as lessee of the mines) proceeded to work the mines,—the court, following *Caledonian Rail. Co.* v. *Sprot* (*b*), said he could not (save under the provisions of the company's Acts, where and so far as these provisions extended) work the mines to the injury of the bridge, by weakening the support,—*scil.*, because that would be defeating the very purpose of the purchase, and would be in derogation of his lessor's own grant ; but under the provisions of the Act (which provisions extended to lands within twenty yards of the bridge), he could require the company to purchase the minerals required to be left for support, and failing their purchase, he could work, doing no avoidable damage ; also, he could not be compelled to continue the water in the mines, their flooded condition being an accidental circumstance which the company had no right to require the artificial continuance of.

(3) *North Eastern Rail. Co.* v. *Crossland.*

And, similarly, in *North Eastern Rail. Co.* v. *Crossland* (*c*), where the plaintiff company (or its predecessors in title) had acquired by agreement a piece of land, and also the right to a tunnel to be constructed through other land,—and the agreement was by virtue of a special Act, whereby the minerals were excepted from the conveyance with full liberty to work and get them, "*so always that the railway or tunnel should not be damaged*,"—the mine-owner (or his lessee) being bound to repair any damage that might be done, and (failing him) the railway company being at liberty to repair the damage at his expense ; and the defendant (the mine-owner) subsequently claimed to work the minerals, and (with a view thereto) gave the railway company notice of his intention to work, purporting to give such notice under the provisions of a subsequent special Act (and which provisions were to the like effect as those contained in the Railways Clauses Consolidation Act, 1845),—the court said, that he could not work so as to endanger the stability

(*b*) (1856), 2 Macq. 449 ; 1 Paterson, 633.

(*c*) (1862), 2 J. & H. 565 ; *R.* v. *London and North Western Rail. Co.*, [1899] 1 Q. B. 921.

of the railway or tunnel,—and that the company were not bound to purchase the minerals in order to prevent his working. In fact, the railway company had, under the circumstances, acquired a right of *vertical* support (under their agreement) and a right of *lateral* support (by the common law),—and this is because, generally, when land is acquired for a special purpose known to the vendor, he (the vendor) or his successors in interest cannot afterwards defeat that purpose by working the mines too near, either in the subjacent or in the adjacent lands, where to do so would be to derogate from his own grant ; and there is an implied warranty of support in such cases, sufficient for the purpose contemplated by the parties.

Right of support for railway,—when not acquired on the first acquisition of the land for the railway.

However, that principle applies only when the right of support is, in fact, acquired on the occasion of the original purchase of the lands. And therefore, in *Fletcher* v. *Great Western Rail. Co.* (*d*), which was the case of a purchase of lands by a railway company under the Lands Clauses Consolidation Act, 1845, and the Railways Clauses Consolidation Act, 1845 ; and the prescribed notice of intention to work the minerals was given ; and the company gave notice that the working of the minerals would destroy the railway,—the court held, that the company must pay for the minerals left unworked,—failing which, the plaintiff would be entitled to work them. Also, in *Great Western Rail. Co.* v. *Bennett* (*e*), which (in the courts below) was considered to be undistinguishable from (and therefore was decided merely in accordance with) *Fletcher* v. *Great Western Rail. Co.*, *supra*, the House of Lords said, that,—apart from the specific provisions contained in ss. 77—85 of the Railways Clauses Consolidation Act, 1845,—the company would be entitled (like any ordinary purchaser of lands) to the right of support from the underlying strata, according to the principle of the decisions in *Caledonian Rail. Co.* v. *Sprot* (*f*), and *North Eastern Rail. Co.* v. *Elliot* (*g*), which merely expressed the common law ; but that the provisions contained in ss. 77—85 (wherever they were applicable) created a new code as to the relations between vendors and the compulsory purchasers from them. And it was stated, that the object of these provisions was to get rid of the common law altogether ; and the vendor was required to sell the surface and any minerals so near the surface that they must

(1) *Fletcher* v. *Great Western Rail. Co.*

(2) *Great Western Rail. Co.* v. *Bennett.*

(*d*) (1860), 4 H. & N. 242 ; 5 H. & N. 689 ; 28 L. J. Exch. 147 ; 29 L. J. Exch. 253.

(*e*) (1867), 36 L. J. Q. B. 133 ; L. R. 2 H. L. Cas. 27.

(*f*) (1856), 2 Macq. 449.

(*g*) (1863), 10 H. L. Cas. 333.

be taken (for the purposes of the railway) to form part of the surface,—that is to say, the vendor was required to sell the surface, and nothing but the surface, and as if there were at the time no mines to be considered at all ; and that being so, justice obviously required that when the vendor (or his assigns) was proceeding to work the mines, he (or they) should be in the same position as if the surface had not been sold at all ; and when that time arrived, the parties were to enter upon the consideration of the minerals,—the vendor being then left as free and unhampered by the previous compulsory taking of the surface as if the surface had not been taken at all, and being entitled to get the mines (failing the company's purchase thereof after notice of the intention to work) in the usual course of working and regardless of any question of support to the surface.

Not even where the right originally acquired is the right to a tunnel.

In *London and North Western Rail. Co.* v. *Ackroyd* (*h*), where the predecessors in title of the plaintiff company (who were also a railway company) had acquired from one of the defendants the right to construct a tunnel ; and subsequently the grantor of that right had leased to his co-defendant the minerals within and under certain lands comprising the lands in which the tunnel was ; and the lessee gave the plaintiff company notice of his intention to work the minerals, unless they duly compensated him therefor ; and the plaintiff company refused to do so, and claimed that they were entitled to the right of subjacent and adjacent support for the tunnel,—the court said, that, in respect of the tunnel, the plaintiff company were not entitled to the support claimed, any more than they would have been in case they had acquired the whole stratum of soil which had been excavated to make the tunnel.

Where coal seams only are excepted, —right of support therefrom not acquired on the original purchase.

In *Re Lord Gerard and The London and North Western Rail. Co.* (*i*), where the company had purchased certain surface lands together with the minerals (other than the coal) thereunder,— and there was an arbitration to ascertain the compensation or purchase money payable,—the court said, the owner of the coal would have the right, in the ordinary course of working it, to traverse the soil and minerals of the railway company (comprised in the company's purchase) so far as it would be necessary to do so,—upon the maxim that whenever anything is granted or excepted, the necessary right to get it is impliedly granted

(*h*) (1862), 31 L. J. Ch. 588.

(*i*) [1894] 2 Q. B. 915 ; [1895] 1 Q. B. 459.

or excepted also ; and when the time arrived for the coal to be gotten, the coal-owner could give the usual notice of his intention to get it, and it would then be time enough for the company to consider about purchasing the excepted coal or not, —with a view to acquiring the right of support to their railway.

Where lands taken are subsequently sold as superfluous lands,—no right of support at all.

In *Pountney* v. *Clayton* (*k*), where a railway company acquired certain lands without the minerals and without any right of support,—save that they would be entitled to notice of the intention to work the minerals, and might then buy them (or part of them) or not,—and the lands afterwards became superfluous, and were sold (as such) by the railway company, to X., who sold them to the plaintiff,—the court held, that the plaintiff had no right of support to his surface-lands, or to the buildings erected thereon ; and, apparently, in such a case, the plaintiff was not entitled even to receive any notice of the mines being about to be worked.

COMPENSATION, AS BETWEEN LESSOR AND LESSEE.

Compensation, where mines are in lease,—not to be paid twice over.

Where mines are in lease, and the railway company purchases under s. 6 of the Railways Clauses Consolidation Act, 1845, they are to pay the due compensation to the "owner and occupier,"—and the compensation payable is therefore (as to part thereof) to the lessor, and (as to the residue thereof) to the lessee (*l*) : But where the railway company does not purchase under s. 6, and the lessee in due course gives notice under s. 68 of the Railways Clauses Consolidation Act, 1845, of his intention to work the mines, and the company thereupon offers to purchase the mines, —and actually purchases them, whereby they are left unworked by that lessee,—the question arises, whether upon the expiration (or other the sooner determination) of that lease, the lessor (or his assigns) may again demise the same mines, so as to entitle the subsequent lessee desiring to work the mines to require compensation from the railway company for again leaving the mines unworked,—which would be, *primâ facie*, inequitable (*m*) ; and the answer to this question is,—that the lessor must be compensated in respect of *his interest* in the mines (whether such compensation is under s. 6 or under s. 68 of the Act, or otherwise) ; and, subject to such compensation being paid, the lessor (or his assigns) will be restrained,—and the subsequent lessee

(*k*) (1883), 11 Q. B. D. 820.

(*l*) *Smith* v. *Great Western Rail. Co.* (1877), 3 App. Cas. 165.

(*m*) *Ibid.*

also therefore will be restrained,—from working the minerals for which the railway company has already paid to the first lessee the compensation payable to him ; and the lessor's compensation would be the aggregate amount of the royalties which he would have received from the first lessee in case he (the first lessee) had worked out (being in a position to work out) the whole coal left (*n*).

COMPENSATION, AS BETWEEN TENANT FOR LIFE AND REMAINDERMAN.

Tenant for life,—may be entitled to the whole compensation payable to the lessor,—*e.g.*, where mines leased by the settlor, and readily workable out during the life-estate.

In *Gamlen* v. *Lycn* (*o*), where certain mines lying under and near to a railway, and which were the property of A., were demised by A. ; and were afterwards devised by A. upon trust for B. for life, with remainders open ; and during the life of B., the lessee gave notice to the railway company of his intention to work the mines, whereupon the railway company required the minerals to be left unworked, and the compensation payable therefore was ascertained (and the part thereof payable to the lessee was apportioned, the residue thereof being payable to the reversioner),—the question arose, whether B. was entitled to receive the whole sum apportioned to the reversion ; and it appearing that the whole of the mines would have been readily gotten by the lessee during B.'s life, B. was held entitled to the whole, s. 74 of the Lands Clauses Consolidation Act, 1845, affording a guide to the court in arriving at that decision.

But usually, —and especially where no lease,—the compensation will be settled as capital moneys.

In *In re Robinson's Settlement Trusts* (*p*), where the mines under and near to the railway were settled on B. for life, with remainders over ; and the mines were not in lease, but B. gave notice to the railway company of his intention to work the mines himself ; and thereupon the railway company purchased them,—the compensation moneys were held to be capital, and to take the place of the portion of the settled inheritance which had been alienated ; and B. was therefore not entitled to the whole, —although there was a reasonable probability that the whole of the mines purchased might have been gotten and worked by B. during his life ; and the compensation was to be invested, and (under s. 69 of the Lands Clauses Consolidation Act, 1845) it would ultimately become payable to the person who should become absolutely entitled to the settled land.

(*n*) *Smith* v. *Great Western Rail. Co.* (1877), 3 App. Cas. 165.

(*o*) (1886), 33 Ch. D. 523.

(*p*) [1891] 3 Ch. 129.

SECTION III.—*Waterworks,—Mines Under and Adjoining.*

Waterworks Clauses Consolidation Act, 1847,—provisions of, as regards mines and minerals.

Under s. 6 of the Waterworks Clauses Consolidation Act, 1847 (*q*), any mines may (under the description of *lands*) be acquired by the water company in the first instance (*r*),—s. 6 of that Act having (as regards the word lands) the same meaning as s. 3 of the Lands Clauses Consolidation Act, 1845 (*s*) ; and the compensation payable on that first acquisition will extend, therefore, to include also the damage arising from the then injurious affection of the vendor's other mines (or lands) not then acquired (*t*). But the sections of the Waterworks Clauses Consolidation Act, 1847, which are specifically applicable to mines as mines, are ss. 18—27,—and the short effect of the provisions contained in these sections may be stated as follows :—

Mines,—no express exception of, necessary.

By s. 18,—the mines and minerals (unless expressly purchased) are excepted out of the conveyance to the water company ; and by ss. 19—21, the water company are to keep a map or plan showing all their pipes and conduits and underground works. Then (by s. 22) if the mines lying under (or within forty yards or other the prescribed distance from) the company's reservoir or its pipes, conduits, etc., as shown on the plan, are about to be worked, the company is to have thirty days' previous notice of the intention to work them ; and the company may (if the working appears to the company likely to damage the company's reservoir, pipes, etc.) offer (within the thirty days) to buy the mines at a price to be agreed upon, or (failing agreement) to be ascertained by arbitration,—and, upon such offer being made, the mines are to be left ; but, failing such offer, then (by s. 23) the mines may be worked in the usual mode of working mines in the district ; but for damage to the company's reservoir, pipes, etc., occasioned by any unusual working of the mines, the company is to be compensated. Or (by s. 24) if, by reason of any apprehended injury to the company's works, the mines are not in fact worked, then air-ways and levels (not exceeding eight feet square or other the prescribed limit) may be driven through them for the purpose of working and getting the mines on either side, the water company (by

Mines,—duty of waterworks company, to subsequently pay for same, if working stopped ;

or to pay for injurious affection, if mines not stopped but worked by air-ways, etc.

(*q*) 10 & 11 Vict. c. 17.
(*r*) *Smith* v. *Great Western Rail. Co.* (1877), 3 App. Cas. 165 ; *Holliday* v. *Wakefield* (*Corporation*), [1891] A. C. 81.
(*s*) 8 & 9 Vict. c. 18 ; *Holliday* v. *Wakefield* (*Corporation*), *supra*.
(*t*) 10 & 11 Vict. c. 17, s. 6 ; *Holliday* v. *Wakefield* (*Corporation*), *supra*.

s. 25) paying compensation (from time to time) for the loss of the mines left and for the additional expense of working the mines on either side thereof; and (by s. 27) the water company is liable for any injury resulting to the mines from the company's works.

COMPENSATION, TIME FOR CLAIMING.

Obscurity in the provisions of the Act,—as to time for claiming compensation for injurious affection.

In *Holliday* v. *Wakefield* (*Corporation*) (*u*), the plaintiffs were the lessees of divers seams of coal under and on both sides of the water company's works, and the defendants (the water company) had offered to buy a certain part only of one of the seams,—and the plaintiffs thereupon claimed to have immediate compensation for the coal lost (by being left) from apprehended injury to the waterworks; but the court (not without some difference of opinion) considered the claim premature,—and apparently for this reason (although it is very difficult to get at the true reason), namely,—because (by s. 27) the water company would be liable if their water got through into the mines; and the mines lost from the apprehended injury were not yet ascertained,—*scil.*, because no air-ways and levels had yet been driven through the coal left; and until the provisions of s. 24 had in that respect been complied with, the compensation payable under s. 25 did not arise, nor could be ascertained. And, *semble*, the water company is the judge of the prospective damage referred to in (and provided for by) s. 22; and the miner is the judge of the apprehended injury referred to in (and provided for by) s. 24.

SURFACE MINERALS,—TO WHAT EXTENT ACQUIRED ON ACQUISITION OF SURFACE.

Minerals,—to what extent acquired by the company (railway or waterworks),—when mines not expressly acquired by the company.

Both in the Railways Clauses Consolidation Act, 1845 (s. 77), and in the Waterworks Clauses Consolidation Act, 1847 (s. 18), even where the mines are not expressly purchased, such parts thereof as are necessary to be dug or carried away or used in the construction of the works pass into the company. Thus, in *Glasgow* (*Corporation*) v. *Farie* (*x*), the plaintiffs (the water company) succeeded in restraining the defendant (the working owner of the mines under and adjoining the company's works) from working the (common) clay under the waterworks,—the court considering that, under the circumstances, the common clay (whether it was a mineral or not) was portion of the surface

(*u*) [1891] A. C. 81. (*x*) (1888), 13 App. Cas. 657.

Surface clay.

purchased by the water company. For it appeared in that case, that the clay was only two feet below the surface, and could not be worked otherwise than by open workings; and the court considered, that the phrase "mines" of coal, and of iron, and of other minerals, as used in the Waterworks Clauses Consolidation Act, 1847, meant (as regards clay) only a mine of clay, and not a quarry of clay or an open clay field.

Freestone and limestone,—the upper layer of.

But the decision in *Farie's Case*, *supra*, must apparently be read with some reserve; for in *Midland Rail. Co.* v. *Robinson* (*y*), where the minerals consisted of freestone and limestone lying under and within forty yards from the railway line, and the defendant gave the company notice of his intention to work them in the ordinary mode of working usual in the district (*i.e.*, by open or surface workings),—the court held, that he was entitled to do so, the plaintiff refusing to purchase the mines,—but there was some diversity of opinion among the judges, the decision in *Glasgow* (*Corporation*) v. *Farie* (*z*) being relied upon in favour of the railway company, so far as the freestone and limestone formed in fact portion of the surface acquired by the company for its railway.

The brick-clay,—on surface.

Also, in *Ruabon Co.* v. *Great Western Rail. Co.* (*a*), where the railway line passed over a bed of clay,—and, in the district, the clay was ordinarily worked by surface workings; and the plaintiff company (the owners of the clay) gave the defendants notice of intention to work the mines; and the defendants not purchasing the mines, the plaintiffs proceeded to get them in the ordinary mode of working,—which necessitated their removal of the vegetable earth above them, and which was admittedly portion of the surface acquired by the railway company,—and the defendant company thereupon interfered with their getting the mines by what they called a trespass to their surface soil,—the court held, that the plaintiffs were justified in getting the clay, and were not to be interfered with by the railway company,—save in the way appointed by the Railways Clauses Consolidation Act, 1845, *i.e.*, by purchasing up the clay, or parts of it.

RIGHT OF SUPPORT.

Right of support,—must be

In *Consett Waterworks Co.* v. *Ritson* (*b*), where the defendant (claiming under the lord of the manor) was entitled to the

(*y*) (1889), 15 App. Cas. 19, affirming S. C. 37 Ch. D. 306.
(*z*) (1888), 13 App. Cas. 657.
(*a*) [1893] 1 Ch. 427.
(*b*) (1889), 22 Q. B. D. 318, 702.

mines under a certain allotment,—and (upon the construction of the provisions of the Inclosure Act) he had the right of subsiding the surface without paying compensation; and the plaintiff company had taken compulsorily from the allottee thereof the surface land overlying the mines, and had constructed a reservoir thereon; and the defendant gave the company notice of his intention to work the mines, and (the company not offering to purchase them) he subsequently worked the mines, and damaged the reservoir,—the court held, that the allottee having no right of support, the company (deriving title under him only) had no right of support,—so that the company could only acquire the right of support by purchase from the defendant, the plaintiff company being in that respect entirely like the plaintiff in *Pountney* v. *Clayton* (*c*),—excepting that the company could compulsorily acquire the right of support, which Pountney could not do.

acquired subsequently, by the water-works company, equally with the railway company.

SECTION IV.—*Canals,—Mines Under and Adjoining.*

As regards canals, and the minerals within the lands under and near to the canal, there are usually contained in the private Acts under which the canals are constructed, provisions enabling the promoters to acquire lands by agreement, and also compulsorily,—and (in the later Acts) the provisions of the Lands Clauses Consolidation Act, 1845, are usually incorporated. Under these Acts, the mines and minerals may doubtless be acquired,—but usually are not acquired, at least in the first instance; and it is, in general, provided by the Canal Act, that the owner of the minerals may work and get them,—save under (or within some specified distance from) the canal; and that when his workings come within the specified limit, he shall give notice to the canal company of his intention to work the minerals within the specified distance or under the canal. And the company are empowered, upon receiving such notice, to enter and examine the mine; and if they think fit to purchase the mines, they may do so, at a valuation; and if the company decline to purchase, the owner of the minerals may then work them, provided he work them in the usual and proper manner.

Private Canal Acts,—general provisions of, as regards minerals.

(*c*) (1883), 11 Q. B. D. 821.

RIGHT OF SUPPORT.

In *Birmingham Canal Co.* v. *Dudley* (*d*), where the Canal Act fixed a twenty yards limit in the case of the canal company's tunnel and a twelve yards limit in the case of the canal itself,—and within these limits prohibited the minerals from being worked,—*scil.*, without the consent of the canal company, who (in case they refused their consent) were required to purchase the minerals left unworked within the twelve yards,—the court said, that the section of the Act requiring the canal company to purchase the minerals left, although in its specific language it applied only to the twelve yards limit from the canal, and not to the twenty yards limit from the tunnel, yet applied equally to the twenty yards limit as to the twelve yards limit,—any other interpretation being senseless; and inasmuch as the company refused to pay the compensation, the mine-owner was not restrained from working.

Right of support,—must, in general, be subsequently acquired by canal company, equally as by railway company.

In *Midland Rail. Co.* v. *Checkley* (*e*), the Canal Act had excepted the minerals to the landowner, with full liberty (subject to a certain provision as to compensation) to work and get them, *not injuring the canal*; and the provision as to compensation was this, namely,—that as regards the minerals under (or within ten yards from) the canal, these were not to be worked without the consent of the company,—and if they refused their consent, they were to buy the minerals; and the defendant who was preparing to work the minerals (stone) gave notice to the company of his intention, and required them to buy the stone, otherwise he should work and get it; and the company having refused to buy the stone, the defendant worked it, and damaged the canal.—The court held, that the defendant must be restrained from further working the stone; and that the plaintiffs must buy the stone which was so left unworked; and such compensation was to include the stone so left, whether it was within the ten yards limit or was outside that limit,—the court saying, that it was absurd to say that the company could stop the working outside the ten yards without paying for the stone, when they could only stop the working within the ten yards by paying for the stone.

Usually, the compensation will extend to mines under the canal, although speaking of mines adjacent.

Where, under the provisions of a Canal Act, the mines within the lands under (or within twenty yards of) any tunnel

Ribs and pillars also,—to be paid

(*d*) (1862), 7 H. & N. 969. (*e*) (1867), L. R. 4 Eq. 19.

of the canal company were to be left unworked, the canal company paying compensation for them when they were about to be worked,—if the mines are held under a lease which requires the whole coal to be worked out, except "*the ribs and pillars*" (required to be left for the support of the roof of the mine),—the canal company is not entitled to the benefit of that exception, so as to escape paying for the ribs and pillars left (*f*).

for, in general.

In *Barnsley Canal Co.* v. *Twibell* (*g*), where certain coal near to the plaintiffs' canal was leased to the defendant; and the canal company, under the powers of their Canal Act, gave notice that the coal was required to be left for the safety of the canal; and they paid the compensation therefor to the defendant's lessor, with full knowledge of the defendant's title as lessee,—the court held, that they remained liable to pay to the defendant compensation for his interest as lessee of the coal,—such compensation being altogether distinct and separate from the lessor's compensation.

Lessee's compensation and lessor's compensation,—distinguished.

COMMON LAW RIGHTS OF MINER, WHERE COMPENSATION REFUSED.

In the *Wyrley Canal Co.* v. *Bradley* (*h*), where the Canal Act (32 Geo. 3., c. lxxx.) provided, that if the company, after receiving notice of the intention to work the mine, refused (for thirty-one days) to purchase the mine, the owner might proceed to work, to within ten yards of the canal,—it appeared, that due notice of the intention to work had been given, and that the canal company refused to purchase the mine, whereupon the mine-owners worked the minerals, and (in so doing) damaged the canal; and the court said, that the meaning of the Canal Act, in requiring the owner of the coal to give notice of his intention to work and in enabling the canal company to thereafter purchase the mine, was,—that the company should purchase if they thought their canal was endangered by the nearer approach of the workings; but that if they declined to purchase, the coal-owners were left to their common law rights as if no canal had been made, in which latter case they might take every part of the coal in the same manner as before the passing of the Act.

Common law rights of mine-owner,—where canal company refuses to pay the compensation;

(*f*) *Swindell* v. *Birmingham Canal Co.* (1860), 29 L. J. C. P. 364.

(*g*) (1843), 7 Beav. 19.

(*h*) (1806), 7 East. 368

But, *semble*, not exercisable so as to injure canal.

And in *Dudley Canal Co.* v. *Grazebrook* (*i*), where the Canal Act (16 Geo. 3), after the usual clauses, enacted, that it should be lawful for the landowners to work the mines, *provided that in working them* "*no injury was done to the navigation*"; and it appeared, that the minerals had been worked,—after due notice of the intention to work them, and after the refusal of the canal company to purchase them; and that, by reason of the workings, a certain aqueduct of the canal company had subsided, involving an outlay of (about) 50*l.* for its repair,—the court held, that the mine-owner was not responsible for the damage occasioned,—BAYLEY, J., saying:—The plaintiffs had no rights, except what were given them by the Act; they were relieved by the Act from the great expense of buying in the first instance the minerals along the whole line of the intended canal, and were enabled to postpone the purchase until the time when the mine-owners really wanted to get the mines; and when that time arrived, the canal company had an option, either to buy,—in which case, the mine-owner could not get the minerals; or not to buy,—in which latter case, he received no compensation at all, and his right to get the minerals remained as complete as if no canal had been made. And with reference to the proviso, that in working the mines "*no injury be done to the navigation*,"—that proviso (the court said) was not to be construed literally, but it was to be construed with some qualification, as that the party working the mines was to do no unnecessary damage to the navigation, or no extraordinary injury by working them out of the ordinary and usual mode. And the like decision was given in the *Stourbridge Canal Co.* v. *Dudley* (*k*), where the Canal Act contained a similar proviso, and the damage was to a reservoir of the company. However, the decision in *Dudley Canal Co.* v. *Grazebrook* (*l*), was considered in *Knowles* v. *Lancashire and Yorkshire Rail. Co.* (*m*) to have depended on its own special circumstances (including the somewhat inconsistent provisions of the special Act of the canal company); and if there had been no inconsistency in these provisions,—or if the apparent inconsistency could have been got over, without sacrificing anything in the Act,—*e.g.*, if the mine-owner (in case he apprehended danger to his mine or to the canal, from the continued working of the mine) might have "*initiated*" proceedings under the Act to compel the canal company to purchase the

(*i*) (1830), 1 B. & Ad. 59.
(*k*) (1860), 30 L. J. Q. B. 108.
(*l*) *Supra.*
(*m*) (1889), 14 App. Cas. 248.

right of support,—then (it was said) the decision might have been different, *scil.*, because the mine-owner would in such a case have been under a statutory liability for the damage.

COMPENSATION, WHEN AN ABSOLUTE RIGHT TO.

Compensation payable,—where miner absolutely bound not to injure the canal.

And in *Cromford Canal Co.* v. *Cutts* (*n*), where the special Act of the canal company (after the usual clauses) provided, that the owners of the mines under and adjacent to the canal should (in effect) retain their titles to these mines ; and that it should be lawful for them to work the mines, "*not thereby injuring, prejudicing, or obstructing the canal*"; and the Act further provided, that if the mine-owner, in pursuing any mine, should work near to or under the canal, so as (in the opinion of the company) to endanger or damage the canal or (in the opinion of the mine-owner) to endanger or damage the further working of the mine, then it should be lawful for the company to treat and agree with the mine-owner for the payment of the compensation for the coal necessary to be left unworked ; and it appeared, that the mine-owner was working up towards the canal, and that in his opinion any further working towards the canal would endanger the canal,—an opinion in which the plaintiff company also at first agreed, although afterwards the company said that the further working would not injure the canal; and the parties could not agree the compensation ; and the mine-owner (the defendant) gave the company notice to settle the amount by arbitration under the Lands Clauses Consolidation Act, 1845 (which Act had been incorporated into the special Act),—The court said, that the defendant had adopted the proper course,—COTTENHAM, L.C., saying (in effect), that the defendant's right of getting the coal was restricted by reason of the words "*not thereby injuring the canal*"; which words put him under *a duty not to injure the canal* ; and in respect of that restriction and for the damage sustained by him in consequence thereof, compensation was provided by the Act ; and that compensation was not included in the original purchase or compensation money paid on the first acquisition of the land by the canal company.

And in such a case, the miner can enforce

In *Knowles* v. *Lancashire and Yorkshire Rail. Co.* (*o*), the Canal Act had excepted the minerals within or under the lands taken for the canal, with liberty to work and get them, "*not*

(*n*) (1848), 5 Rail. Cas. 452.

(*o*) (1889), 14 App. Cas. 248.

payment of the compensation.

injuring the canal"; and the Act provided, that if the canal company should apprehend danger to their canal, or if the mine-owner (or his lessee) should apprehend danger to his mines, from the further working of the mines when the workings approached near to or came under the canal, either the canal company or the mine-owner (or his lessee) might *initiate* proceedings, to have it ascertained what coal should be left and what compensation should be paid by the canal company therefor,—and the plaintiff (the lessee of the mines) gave the company notice of his intention to work, but the defendant company (owners of the canal) did not themselves offer to pay the compensation to be so ascertained, and the plaintiff thereupon worked the mines (doing so in the usual way and not being guilty of any negligence), and damaged the canal,—The court held, that he was liable,—*scil.*, because he should have proceeded himself to ascertain the compensation, and to have taken that in lieu of getting the coal to the injury of the canal.

MINES UNDER THE CANAL, AND ADJACENT THERETO, DISTINGUISHED.

Mines *under* the canal and mines *adjacent*,—distinguished.

In *Chamber Colliery Co.* v. *Rochdale Canal Co.* (*p*), the Canal Act excepted the mines, with full liberty to work and get them, "*not injuring the canal*"; and there was the like provision as to apprehended injury to the canal or to the mines as that contained in *Knowles* v. *Lancashire and Yorkshire Rail. Co.*, *supra*,—excepting that (in the opinion of the court) the words "*not injuring the canal*" applied exclusively to the mines *under* the canal, and not to the mines *adjacent*; and the court held, therefore, that the plaintiff company (the lessees of the adjacent mines) were free to work such mines, if the defendant company refused (and they did refuse) to purchase them,—*scil.*, because (so far as regarded these adjacent mines) the plaintiffs were under no statutory liability for the damage to the canal, and there was not (in fact) any reason to apprehend danger to the mines.

And in *New Moss Colliery Co.* v. *Manchester, Sheffield and Lincolnshire Rail. Co.* (*q*), where the provisions of the Canal Act (the canal being then vested in the defendant company) were similar to the provisions contained in *Knowles' Case*, *supra*,—

(*p*) [1895] A. C. 564. (*q*) [1897] 1 Ch. 725.

the like distinction was recognised as regards the *adjacent* coal.

Right of the canal company, to submit to the damage, rather than pay the compensation.

And in both the cases lastly referred to, the defendant company, rather than purchase the coal, preferred to take upon themselves the liability of repairing any damage that might be done through, or in consequence of, the coal being worked (under or adjacent to the canal) in the usual course of working ; and, *semble*, the damage for which such liability was taken was both the damage to the canal itself from the mine-workings, and the damage also to the mine from any inroad of water from the canal.

COMPENSATION, PRESCRIBED MODE OF ASCERTAINING.

Compensation, the prescribed mode of ascertaining same, to be observed.

In *Fenton* v. *Trent and Mersey Navigation Co.* (*r*), where the special Act of the canal company (1 Will. 4) empowered the company to take lands, subject to paying compensation for the lands taken and for the "injurious affection" to the lands adjoining ; and the Act provided that the mines under certain tunnels carrying the canal should not be worked at all, and (in effect) that the mines within forty yards of the tunnels should not be worked without notice to the company, and that the company should pay the mine-owner for so much of the mineral within the forty yards as the company should require to be left unworked for the protection of the canal, or as the mine-owner should require to be left unworked for the protection of his mines ; and it appeared, that the company required the whole forty yards to be left unworked,—The court said, that the company must pay the mine-owner therefor,—and the amount of the compensation was to be determined according to the machinery in that behalf appointed by the Act, and not otherwise.

Mode of ascertainment of compensation prescribed by repealed Act, —not, in general, affected by the repealing Act,—*sed quære.*

Where the Act under which the lands for the canal (or railway) were acquired in the first instance has been repealed, it appears that the mode of ascertaining the compensation prescribed by the repealed Act would still be available,—and if available, it might require to be observed ; but that is a pure matter of the true construction of the repealing Act ; and the courts have naturally varied a little, in the different cases, in their views of the true construction (*s*).

(*r*) (1841), 2 Rail. Cas. 837.

(*s*) *North Eastern Rail. Co.* v. *Crossland* (1863), 32 L. J. Ch. 353 ; *R.* v. *London and North Western Rail. Co.*, [1899] 1 Q. B. 921.

COMPENSATION AND DAMAGE, DISTINGUISHED.

Compensation, right to,—excludes any right to damages;

It is a general principle, that where any works are executed under the authority of an Act of Parliament,—and the persons empowered to execute them keep within those powers, and are guilty of no negligence (*t*), there the acts done are lawful; and no damage *eo nomine* is recoverable for any loss or damage actually occasioned thereby; but *compensation*, properly so called, is recoverable therefor,—*scil.*, if the Act so provides, but not otherwise (*u*); but in respect of any loss or damage occasioned through a negligent or improper exercise of the powers, damage *eo nomine* (and not compensation) is recoverable (*v*).

except for wilful or negligent damage.

Compensation, when no right to,—a right to damages;

In *Bagnall* v. *London and North Western Rail. Co.* (*x*), the plaintiff (a mine-owner) recovered damages against the defendant company for a flooding of his mine (under and near to the railway) occasioned by the alterations which the company had made (in the surface above) by (and in connection with) the construction of their railway,—that being a damage for which no compensation could have been claimed, in the first instance, on the original acquisition of the land under the Railways Clauses Consolidation Act, 1845.

Unless where the damage should have been included in the original compensation.

On the other hand, in *Rex* v. *Aire and Calder Navigation Co.* (*y*), where the Canal Act expressly provided, that the compensation payable on the original purchase of the lands should include not only the purchase money payable but also the sum to be paid as well for the damage previously sustained as also for all future temporary or perpetual *continuance of any recurring damages*, the cause of which should have been only in part obviated or repaired, and which could be no further obviated or repaired; and the mines were reserved to the landowners, with power to work them, *on condition of doing no injury to the canal*; and the company was authorised to enter and examine any mines, and to require the persons working to desist, if the mines were being worked in contravention of the Act; and the Act was altogether silent as to any further compensation becoming payable in case the mines should thereupon cease to be worked, —The court held, that the original compensation extended to

(*t*) *Croft* v. *London and North Western Rail. Co.* (1863), 3 B. & S. 436.

(*u*) *Cracknell* v. *Thetford* (*Corporation*) (1869), L. R. 4 C. P. 629.

(*v*) *Geddis* v. *Bann Reservoir* (1878), 3 App. Cas. 40.

(*x*) (1861), 7 H. & N. 423; 31 L. J. Exch. 121, 480.

(*y*) (1861), 30 L. J Q. B. 337.

include the loss sustained by a subsequent lessee of the mines who had been required by the canal company to desist from working. And the like decision was given in *Rex* v. *Leeds and Selby Rail. Co.* (*z*), upon similar extensive words contained in a local railway Act.

CONTINUING LIABILITY FOR DAMAGE.

Where continuing duty to prevent damage,—liability for any breach of that duty;

On the other hand, in *Hipkins* v. *Birmingham, etc. Gas Co.* (*a*), where the plaintiff was the owner of a well, and the defendant company had erected a gas-tank within forty-five yards of the well,—the tank being securely bottomed in impervious rock; and subsequently, and by reason of the working of the minerals under certain lands adjacent to the tank, the rocky bottom cracked, and the gas-washings thereby escaped from the tank and percolated into the plaintiff's well,—The court held, that the defendant company were liable to the plaintiff for that damage,—*scil.*, for a certain penalty imposed on them by their Gas Act, in case they should *suffer* any of the gas-washings to escape into any reservoir or well; and the court thought the duty of the gas company to prevent that class of damage was an absolute duty under their Act,—except, possibly, against trespassers; but the mine-owners were not trespassers in getting their minerals.

Also, where danger of damage from the first.

In *Barber* v. *Nottingham, etc. Rail. Co.* (*b*), where the defendant company had constructed in porous soil a reservoir for supplying their canal; and the water from that reservoir found its way into the plaintiff's mines,—partly, of course, by reason of the plaintiff working his mines, and digging pits, shafts, etc., in his own soil, whereby the percolation of the water from the reservoirs was accelerated,—The court held the defendant company liable for the damage, it being no defence to allege that the plaintiff's own workings were the cause of the damage happening,—*scil.*, because these workings were lawful.

WHEN NEITHER COMPENSATION NOR DAMAGE IS PAYABLE.

Neither compensation nor damage,—where the

In *Thomas* v. *Birmingham Canal Co.* (*c*), the plaintiffs were mine-owners in the neighbourhood of the defendant company's canal; and there was an extraordinary rainfall, and the flood-

(*z*) (1835), 3 A. & E. 683.
(*a*) (1860), 5 H. & N. 74; 6 H. & N. 250; 29 L. J. Exch. 169; 30 L. J. Exch. 60.
(*b*) (1864), 15 C. B. (N.S.) 726; 33 L. J. C. P. 193.
(*c*) (1879), 49 L. J. Q. B. 851.

act occasioning the damage would not be wrongful, on the part of any private individual.

water which had got into the canal was momentarily going to burst the canal banks and flood the whole neighbourhood,—flooding, also, the plaintiff's mines ; but the defendant company opened a sluice in the canal, and so relieved the pressure on the banks ; the water, however, which passed through the sluice and thence into a stream-bed overflowed from the stream into the plaintiff's mine, and did all the same damage to the mine as the bursting of the canal banks would have done,—and did it only a little sooner,—and, under these circumstances, the court held, that the canal company was not liable to the plaintiff ; and, further, that the case was not one which entitled the plaintiff to any compensation (properly so called) under the Acts for the construction of the canal.

SECTION V.—*Highways,—Mines Under and Adjoining.*

Highways and other main roads,—ownership of the soil and of the minerals,—generally.

As regards highways and other main roads,—the minerals within or under them belong to the person who is the owner of the soil of the highway or road (*d*),—whoever that may be. Usually, the soil is in the adjoining owner on either side of the road, *usque ad medium filum viæ* (*e*) ; but it may be (*f*),—and, in the case of roads set out under Inclosure Acts, it usually is (*g*),—in the lord of the manor ; or it may be in any other person (*h*) ; but (in the case of turnpike roads) it was not usually vested in the turnpike trustees, although (by special enactment) it might have been so (*i*). But, *semble*, any materials (in the nature of minerals) which, under the provisions in that behalf to be presently mentioned, may have been taken and used for the repairs and maintenance of the road, would not be deemed minerals, but would be and remain portion of the road-surface or road.

ROAD ACTS,—EXCEPTIONS OF MINES IN.

Turnpikes,—minerals excepted by Acts.

By the 3 Geo. 4, c. 126, s. 88, upon the diversion (or discontinuance) of an old turnpike road, the minerals under it were to remain in their previous ownership,—although the turnpike

(*d*) *Goodtitle* v. *Alker* (1757), 1 Burr. 143.

(*e*) *Holmes* v. *Bellingham* (1859), 7 C. B. (N.S.) 329 ; *Berridge* v. *Ward* (1861), 10 C. B. (N.S.) 400.

(*f*) *Beckett* v. *Leeds* (*Corporation*) (1872), L. R. 7 Ch. App. 421.

(*g*) *Seddon* v. *Smith* (1877), 36 L. T. (N.S.) 168.

(*h*) *Leigh* v. *Jack* (1879), 5 Ex. D. 264.

(*i*) *Davison* v. *Gill* (1800), 1 East, 69 ; *Rex* v. *Mersey Navigation* (1829), 9 B. & C. 95.

trustees might have sold the surface of the road (*k*). And by the 7 & 8 Geo. 4, c. 24, s. 18, all mines of iron, tin, lead, copper, coal, and other minerals whatsoever, discovered or found in or under any land used as a turnpike road, were reserved to the owner of the land, with liberty to dig and work the same in the usual mode of working, but so that no damage should be done to the road.

Highways,—minerals excepted by Acts.

By the 5 & 6 Will. 4, c. 50, s. 82, upon the widening of any highway, adjoining land being acquired for such purposes and compensation being paid therefor, the mines and minerals within and under the land so acquired (so far as they can be dug and gotten without breaking the surface of the highway) are excepted to, and remain in, the owner of the land.

Main roads generally,—minerals excepted by Acts.

And under the 41 & 42 Vict. c. 77, s. 27, the mines and minerals within or under any main road (whether highway or disturnpiked road), which by the 38 & 39 Vict. c. 55 becomes vested (or which under the 11 & 12 Vict. c. 63, s. 68, has become vested) in any urban sanitary authority, remain in their previous ownership,—a provision which is applicable also to roads in the Isle of Wight and in South Wales ; but the minerals are to be gotten so as not to damage the road (*l*).

SUBSIDENCE OF, OR OTHER DAMAGE TO, ROAD.

No subsidence (or other destruction) of the road,—authorised, in general.

In *Benfieldside Local Board* v. *Consett Iron Co.* (*m*), which was a case of a public highway set out under the provisions of an Inclosure Act, whereby the mines within and under all the waste lands dealt with by the Act were excepted to the lord with as full liberty and power of working and getting them as before the inclosure, the defendant company (who were the lord's lessees of the mines) worked the mines near to and underneath the highway, and so caused it to subside and become dangerous,—whereby the plaintiffs were driven to expend 30*l.* in repairing it : and they claimed to recover that amount from the defendants,—The court held, that the defendants were liable, *scil.*, because whatever the rights of working and getting the minerals may have been in the private inclosures, these rights could not be construed to authorise the destruction of the public highway which the Act itself had provided for the making and

(*k*) *Coverdale* v. *Charlton* (1878), 4 Q. B. D. 104 ; *Baird* v. *Tunbridge Wells*, [1894] 2 Q. B. 867.

(*l*) *Att.-Gen.* v. *Conduit Colliery Co.*, [1895] 1 Q. B. 301, at pp. 313, 314.

(*m*) (1877), 3 Ex. D. 54.

maintenance of: in other words, the public user of the road, or the safety of the public in using it, was not intended to be thereby interfered with.

MINERALS FOR REPAIR OF ROAD.

Minerals for repair of roads,—(1) Highways;

By the 5 & 6 Will. 4, c. 50, ss. 51—54, materials (in the nature of minerals) for the repair of *highways* may be taken in any waste land or common land (s. 51),—but not from the sea shore, where the taking of the materials would or might cause the sea to encroach on the lands (s. 52); and such materials may also be taken out of any river or brook, where the taking thereof will not damage any bridge or building (s. 51); and also (but only under a justices' order, and only upon the exhaustion of the above sources of supply) out of any private lands (whether enclosed by any visible fence or not) (*n*), not being gardens, lawns, avenues, or the like (s. 54); and in every case, the holes made in getting the materials must (while in use) be securely fenced, and (when no longer in use) they are to be sloped down, and the surface land restored (s. 55); and where the lands out of which the materials are desired to be taken are a regulated common, a justices' order (or else the consent of the conservators of the common) is also now required (*o*).

(2) Turnpikes.

And as regards *turnpikes*, the like provisions as to getting materials for their repair were contained in the 3 Geo. 4, c. 126, ss. 97—99.

Apart from the provisions above specified, such materials could not, of course, be taken out of any private lands,—nor yet (under any purported title to do so, arising by prescription or custom) out of any waste lands (*p*), or from the sea shore (*q*). And accordingly, by s. 100 of the 3 Geo. 4, c. 126, as regards turnpike roads, the road trustees were authorised to *purchase* lands for the purpose of getting stone and gravel therefrom, and other materials, for the repair of the roads; and as regards *highways*, by s. 53 of the 27 & 28 Vict. c. 101, a similar power was given.

Surveyors of highways,—rights of, to

In *Hayes Common* (*Conservators*) v. *Bromley District Council* (*r*), the right to take gravel from the common of the

(*n*) 4 & 5 Vict. c. 51.
(*o*) 39 & 40 Vict. c. 56, s. 20; *Hayes Common Conservators* v. *Bromley Rural District Council*, [1897] 1 Q. B. 321.
(*p*) *Padwick* v. *Knight* (1852), 7 Exch. 854; 22 L J. Exch. 198.
(*q*) *Constable* v. *Nicholson* (1863), 14 C. B. (N.S.) 230; 32 L. J. C. P. 240.
(*r*) [1897] 1 Q. B. 321.

conservators having been refused,—that is to say, the conservators having refused their consent, under s. 20 of the Commons Act, 1876 (*s*), to the defendant council taking the gravel for the repair of the roads,—the council applied to the justices for an order enabling them to take the gravel,—and the justices made the order,—and on appeal of the conservators, the court held, that the justices had an absolute discretion under s. 20 of the Act, to either make the order or to refuse to make it ; and therefore, the right of the council (as surveyors of highways) to take gravel in regulated commons, under s. 51 of the Highway Act, 1835 (*t*), is no longer an absolute right.

take gravel from commons, now dependent on consent of the conservators, or (failing that), an order of the justices.

(*s*) 39 & 40 Vict. c. 56.

(*t*) 5 & 6 Will. 4, c. 50.

CHAPTER VI.

IMPERIAL AND CROWN MANORIAL MINING RIGHTS.

Section I.—*Roman Imperial Mining Rights.*

The distinction between strict ownership and beneficial occupation,—growth of, in Roman law.

According to the Roman law, as well during the period of the Republic as during that of the Empire, the ownership proper (*dominium strictum*) of all lands was vested in the State ; and the State might or might not have vested in it also the beneficial ownership (*dominium utile*) of the lands. Thus, the ancient *Ager Romanus* belonged to the governing families,—that is, to the Republican State,—as well in strict ownership as in beneficial or possessory enjoyment ; while the *Ager Publicus* belonged to the same families,—that is, to the Republican State,—in strict ownership only, the possessory ownership thereof being vested in the grantees or lessees thereof from the State, such latter or possessory ownership being subject to a rent or royalty payable to the State. In process of time, the Ager Romanus developed its area, and (under the new name of *Solum Italicum*) embraced the whole of Italy ; and thereupon the Ager Publicus, being driven wholly out of Italy, and becoming confined to provincial lands only, assumed the name of the *Solum Provinciale* ; but between the Solum Italicum and the Solum Provinciale there continued to exist the like broad distinction, as regards ownership and possession, which had previously existed between the Ager Romanus and the Ager Publicus,—that is to say, the Solum Italicum on the one hand belonged to its private possessors, both in strict ownership and in beneficial possession, and belonged to them, moreover, as being constituent members of the State ; and the Solum Provinciale, on the other hand, belonged to the State in strict ownership only, and the beneficial and possessory ownership was vested in the occupants thereof, who were the tenants of the State, paying a rent or royalty to the State. And at a later period, when the empire was fully established, and the emperor, from being the representative of the State, became the State itself, it naturally resulted from this divesting of the governing attribute out of the constituent members of the State, and investing with that attribute the emperor as

forming in himself the State, that on the one hand all landed possessors became entitled at the most to the beneficial enjoyment of their properties,—that is to say, to the *dominium utile* therein, as tenants or possessors thereof from the State; and that on the other hand the emperor became and continued to be entitled to the strict ownership,—that is to say, to the *dominium strictum*, of all the lands within the ambit of the empire. And in effect, therefore, the entire territory embraced within the Roman empire became one huge Ager Publicus; and the distinction between the Solum Italicum and the Solum Provinciale was wholly exploded,—the Solum Italicum had been degraded to the level of the Solum Provinciale, and the emperor became the only legal owner (*dominus*) of lands, the subject becoming at the most their equitable owner (*dominus uti*).

Mines, came also within the distinction.

In this manner arose and was perpetuated, in Roman law, the broad distinction between the seigneury (*dominium strictissimum*), or superiority of lands, which was vested in the State, and the beneficial ownership (*dominium utile*), or tenure of lands, which was vested in the individual subject. And to mines and minerals the same distinction in respect of ownership was applicable that had been applied to lands; and in the case of mines, there was added a more particular distinction, arising from a more particular cause, that is to say:—

GOLD AND SILVER MINES; AND OTHER MINES.

Gold and silver mines, —ownership of.

It was found, in certain conquered countries, *e.g.*, in Spain and Macedonia, that the gold and silver mines had, previously to the conquest, belonged exclusively to the State, as well in respect of ownership strictly so called as also in respect of beneficial occupation,—these mines being retained in the hands of the State, and being worked directly for the State by means of workmen in the State's immediate employment. And the Roman empire, pursuing its accustomed policy in that respect (which was to adopt the prevailing customs of the conquered countries), by succeeding to the status of the conquered government, succeeded also to the mineral rights that were incident thereto; and therefore succeeded to the ownership of the mines of gold and silver, besides acquiring the more general suzerainty or superiority over all other mines as well. This distinct and peculiar ownership of the mines of precious metal, having originated in the manner outlined above, was extended and perpetuated over every province of the empire; and it remained

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only to define, with legal accuracy and exactness, the respective rights of the empire on the one hand and of individuals on the other, in respect of mines and minerals. And after some vacillation in the matter, by a decree of the Emperor Gratian, A.D., 367 to 383, the imperial mining rights were defined as follows, that is to say :—An exclusive right in the crown to the full legal and beneficial ownership of all gold and silver mines ; and a right in the crown to receive, in respect of all other mines, a proportion of their produce,—which proportion, or the measure thereof rather, was called the *Canon Metallicus*, and usually consisted of one-tenth part of the produce ; and that proportion was payable by the actual mine-worker to the crown directly. And if the mine-worker was owner also of the lands in which the mines were situate, then he was the owner of the minerals subject only to such payment ; but if the mine-worker was not also owner of the lands, then in addition to such one-tenth part payable to the crown, he (the mine-worker) was required to pay one other tenth part of the produce to the owner of the lands ; and subject to the payment of such two equal tenth parts, the mine-worker was the owner of the minerals. And this definition of the Emperor Gratian was recognized and adopted or adhered to in all material respects by the subsequent emperors, notably by the Emperors Theodosius II. (A.D. 408 to 450) and Valentinian III. (A.D. 425 to 455) ; and, accordingly, it became the expression of the measure of Roman imperial or seigneurial rights in respect of mines (*a*).

Mines, other than gold and silver mines, —ownership of.

SECTION II.—*Mining Rights of the English Crown.*

General agreement of English with Roman law, —as regards the mining rights of the crown.

We proceed to consider the mining rights of the English crown ; and with regard to these rights, it may, in the first place, be generally premised, that the English law agrees with the Roman law in the respects following, that is to say,—Firstly, in respect of the so-called royal mines (being mines of gold and silver), these mines are the exclusive property of the crown (*b*), as well legally as beneficially, in the same manner and to the same extent (at least in England) as were the like mines in Roman law, that is to say, free from any right or rights of the subject therein. But, Secondly, in respect of all other mines (being mines of the so-called *baser metals*, or baser

(*a*) The authorities for the preceding general statement are Merivale's History of the Roman Empire ; and the Institutes, Digest, and Code of Justinian generally.

(*b*) 2 Inst. 577.

substances), these mines (which must at one time have been the property of the crown *in posse*, if not *in esse*) have been conceded (with the exceptions hereinafter mentioned) to the subject, to be held by him in full legal and beneficial ownership, in the same manner and to the same extent that the surface of the lands has been conceded to him. And so nearly universal has that concession been, that (subject to the exceptions hereinafter mentioned) the ownership of the surface is the best *primâ facie* title to the ownership also of the mines,—"Cujus est solum, ejus est usque ad cœlum, *et deinde usque ad inferos*." The exceptions just alluded to, and in which the ownership of the baser mineral substances has continued in the crown and not been conceded (or only imperfectly conceded) by the crown to private individuals, are chiefly (and, it is believed, exclusively) the following, namely,—The minerals (whether found in mines or quarries) situate in the following districts, that is to say:—The Forest of Dean (including the hundred of St. Briavel's), in the county of Gloucester; certain parts of Derbyshire (to be hereinafter defined); certain parts of Cornwall (to be hereinafter defined); certain parts of Devon (to be hereinafter defined); certain parts of Wales (to be hereinafter defined); the Isle of Man; and the Sea-shore and Sea-bed,—in all which excepted districts, the crown's ownership remains more or less intact, but subject to certain customary rights in the subject (hereinafter dealt with), which have been from time to time defined by statute.

Ancient proprietary right of crown,—to all mines whatsoever,—

It has been supposed, and with great show of reason, that the crown's title in these excepted districts is the modern remnant of much more extensive ancient imperial mining rights; and that originally a proprietary title to all mines (as to all lands) was, in the contemplation of lawyers, vested in the crown in the person of William I. (descending from him to his successors kings of England), he having by his right of conquest or of acquest acquired the same in ownership and not in suzerainty merely; and it is even alleged, that in certain ancient documents this more extensive right of the crown is expressly recognised,—for example, in King Edward I.'s grant to the tinners of Devon (1305), and to the tinners of Cornwall (1305). But in those early times, the mines of tin and lead, and of gold and silver, were, if not the only, at least the principal, mines to which industry was directed; and by the time that industry began to extend itself to mines of coal, iron, and such like other baser substances, the spirit of liberty and of private encroachment,

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fostered and protected by the genius as well as by the forms of the English law, occasioned the assertion by individual landowners of rights that were exclusive of the crown. Whence it appears, that, in or about the year 1568, the respective adverse rights of the crown and of the private landowners became the subject of contention, and called for definition by the courts of justice, *The Case of Mines* (*c*) having been decided in that year; and the judges distinguished in that case (and apparently for the first time) in an authoritative and definite manner between the mining rights of the crown and those of the subject, holding (in effect) that only the so-called royal mines belonged to the crown, and that all the baser minerals belonged to the individual landowner,—the decision, of course, not applying to the rights of the crown (then already admitted) in Devon and Cornwall as to tin, or in Derbyshire as to lead, or in the Forest of Dean and the Isle of Man as to the baser minerals generally.

Until, in *The Case of Mines*, the distinction was taken between royal mines and other mines.

(i.) Mines of gold and silver (otherwise royal mines).

Mines of gold and silver,—crown ownership of.

According to the law of England, royal mines are mines of gold and silver; and these are the exclusive property of the crown; and they are the property of the crown by the royal prerogative,—so much so that, though the king should grant lands in which mines are, *and all mines in them*, yet royal mines will not pass by so general a description (*d*). The crown title by prerogative is said to have originated in the king's right of coinage, in order to supply him with materials (*e*); but the title may have been simply a title by transmission from the Roman law,—the strong and (as regards royal mines) perfect analogy between the Roman and the English mining laws being abundantly evident (*f*).

The Case of Mines,—parties to, and claim in.

In *The Case of Mines* (*g*), which was an action depending in the Court of Exchequer between the Queen and the Earl of Northumberland, upon an information exhibited by the Queen's attorney against the earl, touching a mine of copper (containing gold or silver) claimed by the Queen in the lands of the earl,—the information recited, that the Queen by reason of her prerogative royal was entitled to all and singular mines and ores of gold and silver, and of all other metals whatsoever containing in them gold or silver, with the appurtenants, which might or could be

(*c*) (1568), Plowd. 310.
(*d*) Plowd. 336.
(*e*) 1 Bla. Com. 294.
(*f*) *Vide*, pp. 106—108, *supra*.
(*g*) (1568), Plowd. 310; Dy. 88 a.

found in any lands within the realm of England or other the dominions thereof, as well in the proper lands and soil of the Queen as in the lands and soil of any of her subjects; and the information further recited, that the Queen, being at the time seised in her demesne as of fee (in right of her crown of England) of and in certain waste lands called Newlands, in the county of Cumberland, in which were certain mines and ores of copper containing in them gold or silver, commanded one Thurland and one Howseter to search and dig for copper ore containing in itself gold or silver within the said waste lands for the use of the Queen, and also to win and carry away the same for her use; whereupon and in pursuance of such command Thurland and Howseter dug up within the lands 600,000 pounds weight of copper ore containing gold and silver, and laid the same upon the surface of the lands for the purpose of removing the same, and were continuing to dig and win the copper ore and to lay the same upon the surface for the purpose of removal, until interrupted in so doing by the earl,—who (the information stated) entered and intruded upon the lands, and hindered and disturbed Thurland and Howseter, not only from searching and digging as aforesaid, but also from taking and carrying away the before-mentioned 600,000 pounds of copper ore, and yet continued to hinder and disturb them as aforesaid, to the damage of the Queen in 1,000*l.*; and the information prayed the advice of the court in the premises. To this information, the earl pleaded a denial of the alleged right of the Queen, by reason of her prerogative royal, to have and enjoy all mines of gold and silver, and of other metals whatsoever containing in them gold or silver, with their appurtenants, in the lands of any of her subjects; and further (and by way of special plea), alleged,—that the waste lands in question were part of the greater waste of Derwentfels; and that Philip and Mary (sovereigns of England), being seised of the greater waste in their demesne as of fee in right of the crown, granted unto the earl in fee tail male the said waste by the descriptions in the plea particularly set forth, being generally their honor, castle, lordship, manor, park, and forest of Cockermouth, and all other their lordships, manors, lands, tenements, and villages therein particularly specified, with the appurtenants; and that the earl, by virtue of the said grant, entered upon the said waste lands in Newlands aforesaid, and lawfully hindered and disturbed Thurland and Howseter in the manner alleged in the information.

The Case of Mines,—arguments on behalf of the crown.

And in support of the claim of the crown, it was argued (among other things not now material to specify), that as well by the precedents of mining grants produced from the Exchequer, as also by numerous copies of accounts also produced from the Exchequer purporting to have been rendered to the crown by the workers of gold and silver in respect of the King's dues, it manifestly appeared that the King had purported to make grants of, and had also been answered for the revenue of, mines of gold and silver, as well such as were in his own lands, as also such as were in the lands of subjects. And as regards mines of the baser sort, but which contained gold or silver,—*e.g.*, the copper mines in question,—it was argued, that the entire ore belonged to the Queen, seeing that she could not get the gold or silver save by melting the copper ; and divers precedents were produced which appeared to support the crown's title to these mixed mines,—particularly, that of Robert Brown's copper mine in Salop, 7 Edw. 3 ; that of Jacob Minor's copper mine in Salop, 17 Richd. 2 ; that of Henry and John Darby's lead mine in Devon, 7 Hen. 4 ; and other precedents of a still more convincing character in the reign of Hen. 6 were produced, it appearing that the last-mentioned king had in numerous instances demised and granted, not only the gold and silver mines, but also all other the mines containing gold or silver, in the counties of Devon and Cornwall, as well in the lands of others as in the crown's own possessions there, the grantees and lessees rendering therefor to the crown (to be accounted for in the Exchequer) a variable proportion of the produce or of its value, and rendering also (but as a matter of royal grace only and not of private right) a certain other and variable proportion to the private landowner, if and when the mines were situate in private lands.

The Case of Mines,—the judgment.

And the divers arguments which were put forward on behalf of the earl in answer to the claim of the crown having been disposed of, the court held,—that, upon the true construction of the grant by Philip and Mary, the words, being capable of applying to base mines, should in the particular instance be so satisfied, and did not extend to include royal mines,—and this notwithstanding that the words of the grant were very strong, being *omnes et singulae minerae*, and the mines were expressed to be granted *de gratiâ suâ speciali, certâ scientiâ, et mero motu regis*, DYER, L.C.J., observing,—that if the Queen had a mine-royal, and no other mine, in the soil of J. S., and she made a

grant of all and singular her mines in that soil to a stranger *ex certâ scientiâ*, then and in such case the mine-royal would pass,—for else the words would be void and without effect, as having nothing to operate upon and to be satisfied by, save only the mine-royal ; but that if the Queen had, in addition, any base mine in J. S.'s soil, then the words of the grant would be satisfied by reference to such base mine, and consequently the mine-royal would not pass, but only the other mines. And it was accordingly adjudged, that the copper mines in question containing gold and silver (and also the ores raised and to be raised therefrom) belonged to the crown.

INCIDENTAL MINING RIGHTS OF CROWN.

Crown,—right of, to enter and work.

The Case of Mines also decided,—or, at least, assumed as too plain for argument,—that the crown was entitled to enter upon the lands of the subject, and to dig therein, in order to get and to carry away the ores ; and although, in *Lyddal* v. *Weston* (*h*),—where there was a grant from the crown of lands, with an express reservation of royal mines, but no express right of entry,—Lord HARDWICKE was of opinion that there was not by the terms of the reservation any right of entry in the crown, and that not even by the royal prerogative had the crown any such right,—*scil.*, because it would be very prejudicial if the crown could enter into a subject's lands or grant a license to another to do so,—still, in *Seaman* v. *Vawdrey* (*i*), Sir W. GRANT, M.R., was of opinion, that the decision in *The Case of Mines* was to the contrary, and should be upheld ; and apparently, also, the crown may take timber for the use of the mines, but not for the purposes of sale (*k*).

UNCERTAINTY AS TO WHEN THE BASER MINES WERE ROYAL MINES.

Mines of the baser metals,—the uncertainty as to their being royal mines.

There used to be some uncertainty as to what constituted a royal mine,—it being considered by some, that, if *any* gold or silver was found in the mine, that was sufficient to bring it within the definition of a royal mine ; and by others, that a mine was not to be deemed a royal mine, unless the quantity of gold or silver exceeded in *value* the other mineral in which

(*h*) (1739), 2 Atk. 20.
(*i*) (1810), 16 Ves. 393.
(*k*) 2 Inst. 578 ; 18 Edw. 1 ; Northumberland Pipe Roll, A.D. 1226 ; *The Aldeneston Mine* (otherwise called *The Mine of Carlisle*), Hodgson's Northumberland, vol. 3, part 2, cc. 45, 54.

it was found (*l*). And it was latterly considered, that if the gold or silver, although of less value than the other mineral, was yet sufficient to bear the charge of refining it, or was of more worth than the base metal spent in refining it, then it was a mine-royal, and as well the base metal as the gold and silver in it belonged to the crown (*m*) ; and if the royal metals were found in a pure state, or if they could be extracted without the ordinary smelting process, the mine was to be considered a royal mine, without reference to the cost of extraction.

REMEDY FOR THE INCONVENIENCES RESULTING FROM THAT UNCERTAINTY.

Royal mine, —mixed mines excluded from the definition of.

Considerable difference of opinion, however, still prevailed with respect to the actual fact of the royal metals bearing the charges of refinement. And although, in *Sir Carbery Price's Case* (*n*), the claims of the crown received a check, still the right of entry in search of royal mines continued oppressive in the extreme, and any mine remained liable to be claimed as a royal mine (*o*). Which state of things calling loudly for a remedy, therefore the Act 1 Will. & Mary, c. 30, was passed, whereby it was declared, that no mine of tin, copper, iron, or lead should thereafter be taken to be a royal mine, although gold or silver might be extracted out of the same. And that enactment also proving insufficient, therefore the Act 5 Will. & Mary, c. 6, intituled "An Act to prevent Disputes and Controversies concerning Royal Mines," was passed : Which Act, after reciting the doubts and questions which had arisen upon the true intention and effect of the 1 Will. & Mary, c. 30, enacted, that all owners or proprietors of any mines in England or Wales, wherein any ore then was, or thereafter should be discovered or wrought, and in which there was *copper*, *tin*, *iron*, or *lead*, should hold and enjoy the same mines, notwithstanding that they should be pretended or claimed to be royal mines,—the crown, nevertheless, and all persons claiming royal mines through the crown, being given the right to purchase the ore of any such mines (other than tin ore in the counties of Devon and Cornwall), upon payment therefor, within thirty days after the ore was *raised*, *washed*, *and made merchantable* ; and the price for the purchase was,—(1) for ore in which was copper, 16*l*. per ton ;

Mixed mines, containing gold or silver,— declared the property of the private landowner, subject to the crown's right of purchase.

(*l*) (1567), Plowd. 336.
(*m*) Heton's Account of Mines, p. 21.
(*n*) See Sir Humphrey Mackworth's Mine Adventure Expedient, p. 13.
(*o*) Heton, 27.

(2) for ore in which was tin, 40*s.* per ton ; (3) for ore in which was iron, 40*s.* per ton ; and (4) for ore in which was lead, 9*l.* per ton ; and in default of payment the owners were to be at liberty to sell the ore for their own use. And, by the 55 Geo. 3, c. 134, the price for the purchase of ore in which was lead, was raised to 25*l.* per ton.

Gold and silver mines, —still remain royal mines.

The true effect (or purpose) of the statutes just referred to came under the consideration of the court in *Attorney-General* v. *Morgan* (*p*), which was a case relating to a gold mine in Merionethshire ; and it was decided in that case, that the Acts of William and Mary leave untouched the title of the crown to gold and silver mines ; and that these Acts refer only to copper mines, lead mines, iron mines, and tin mines containing gold or silver, the Acts requiring (but as regards these specified mines only) that the crown shall purchase the copper ore, lead ore, iron ore, and tin ore gotten and dug thereout respectively, at the specified price and within the specified time, or else shall leave such ores (together with the gold or silver therein) to the individual miner. And it was held in that case, that the mine being a gold mine (and nothing but a gold mine) was a royal mine, and as such was not subject to the provisions giving the crown the option of purchase. In other words, the relaxation in favour of the subject of the royal prerogative as regards copper mines and the other specified mines containing gold or silver was limited to the specified mines, and did not extend (and was not applicable) to gold mines (or to silver mines) popularly and properly so called.

MINES OF ALUM, AND OF SALTPETRE.

Mines of alum and saltpetre,— not royal mines.

In certain reigns, the crown has claimed the right to other mines, as alum mines ; and in the reign of James I., in *The Case of Saltpetre* (*q*), it was the unanimous opinion of all the judges, that the crown could, for the defence of the realm, grant licences for working saltpetre (for gunpowder) in any lands of the subject,—the licensees not undermining any walls or houses, and making the places as commodious for the owner after digging as they were before. But the unanimous opinion also was, that the owners of the land could not be restrained from digging and taking the saltpetre,—*for the king had no interest in it* as in gold and silver, *but purveyance* only, the property being in the owner.

(*p*) [1891] 1 Ch. 432. (*q*) (1607), 12 Rep. 12.

ROYAL MINES, IN IRELAND; AND IN SCOTLAND.

Royal mines, —in Ireland; and in Scotland.

The rights of the crown as regards royal mines in Ireland are wholly governed by the English law. But as regards royal mines in Scotland, the law regulative of the crown rights was, of course, the Scotch law; and by that law, mines of gold and silver were reckoned *inter regalia*, and were deemed to be reserved to the crown in every grant, unless they were specifically conveyed thereby. And this rule was without exception in the case of gold mines; but with regard to silver mines (*i.e.*, lead mines containing silver), the mine was to be deemed a royal mine, only where three-halfpence of silver could be extracted from the pound of lead (*r*). Subsequently, however, by an unprinted Act of the year 1592, c. 12 (*s*), every freeholder (*i.e.*, every landowner), whether holding of the crown directly or of a subject, was declared entitled to a grant of all gold and silver mines within his own lands, rendering therefor to the crown one-tenth part of the produce; and the Act extended to tin and copper mines as well, containing gold or silver.

ROYAL MINES IN THE COLONIES.

Royal mines, in the colonies.

As regards royal mines situate in the colonies and dependencies or in other the foreign possessions of the crown, the crown title thereto used to be, and (subject to the colonial Acts to be presently referred to) still is, governed wholly by the law of England (*t*),—that is to say:—Upon a sale or grant of any waste lands of the crown, royal mines do not pass unless they are specifically included in the sale or grant,—that being according to the rule of construction which was applied, in *The Case of Mines*, *supra*, to the grant by Philip and Mary. But the crown has now, in most cases, parted with its rights in respect of royal mines in the various colonies (and in respect of crown lands in the colonies generally) to the respective colonial legislatures, to be dealt with by such legislatures in accordance with the specific regulations which they shall consider best for the good of the colonies (*u*); and accordingly in the construction of all crown grants of waste lands within the colonies, what is now to be principally regarded are the

(*r*) Act, 1424, c. 12.
(*s*) 3 Thomson's Acts, 556—558.
(*t*) *Woolley* v. *Att.-Gen. of Victoria* (1877), 2 App. Cas. 163.
(*u*) *Osborne* v. *Morgan* (1888), 13 App. Cas. 227.

provisions (general and specific) of the colonial and other local Acts and regulations (*x*).

Royal mines in the colonies,—still (to some extent) differently regarded from other mines.

But even in the colonies, and as regards colonial grants of lands, a distinction is to be made (or is, in most cases, to be made) between royal mines and mines of the baser minerals; for the title to each is different, the title to royal mines being a *prerogative* title (gold and silver not being deemed part of the soil), while the title to mines of the baser minerals is deemed a *territorial* title (all these being deemed part of the soil itself) (*y*). And accordingly a grant of the *public lands* of the colony or province may (and usually will) include the minerals (other than the gold and silver mines) within the lands, but may or may not (and usually will not) include the royal mines within the lands (*z*),—the grant still requiring to be construed with some reference to the rule of construction which was applied in *The Case of Mines* (*a*).

(ii.) Manorial mines of crown.

Crown's manorial title.

Besides its prerogative title to mines of gold and of silver, the crown has also a *manorial* title to divers other mines; and the manorial title may be in the crown simply, or may be in the crown by virtue of its Duchy of Lancaster or (where there is no Duke of Cornwall) by virtue of its Duchy of Cornwall, or by virtue of some other honour vested in the crown; and it is proposed now to consider all these manorial mining rights.

(*a.*) IN WASTE LANDS OF WALES.

Wales,—waste lands in,—mining rights of crown in.

And, Firstly, as regards certain Waste Lands in Wales.—It appears, that, in Wales, there are divers large tracts of waste land in or over which the neighbouring landowners have (or originally had) but rights of common (called sheepwalks), the freehold ownership of such wastes being in the crown by virtue of the crown ownership of particular manors. And in respect of the mines and minerals within or under such waste lands (as well as in respect of the mines and minerals within or under any customary tenements of the crown manors), the crown possesses (and may exercise) the rights of mining which

(*x*) *Hollyman* v. *Noonan* (1876), 1 App. Cas. 595; *Osborne* v. *Morgan*, *supra*.

(*y*) *Att.-Gen. British Columbia* v. *Att.-Gen. Canada* (1889), 14 App. Cas. at p. 302.

(*z*) *Ibid.*

(*a*) *Esquimault Co.* v. *Bainbridge*, [1896] A. C. 561.

the lord of the manor ordinarily possesses (or can exercise), or rights analogous thereto. And in *Attorney-General* v. *Reveley* (*b*), where the crown's mining rights in certain of these waste lands in Wales were brought into question,—the crown praying that certain alleged encroachments and purprestures made by the defendants on a tract of waste land lying in the parishes of Llanfrothen and Festiniog, in the county of Merioneth, alleged to form parcel of the crown manor of Penllyn in that county, might be ascertained and seised into her Majesty's hands, and that the right of property of her Majesty in the same lands, including (as portion thereof) two pieces or parcels of land called respectively the Coed du Sheepwalk and Moel wyn Mawr claimed by the defendants, and in the soil and freehold thereof, and in all (*slate*) *mines and minerals* lying in or under the same, subject to any lawfully existing rights of common of pasture (or sheepwalk) and common of turbary, might be ascertained and defined,—It appeared, that the defendants, under a purchase-deed dated in December, 1834, from the Mostyns, claimed the waste lands (the particular portions thereof hereinbefore specified) as part of their own freehold possessions of Coed du, Parke, and Penrallt; and that the crown claimed the waste lands as parcel of the wastes of the hundred of Ardudwy, within the manor of Penllyn. And the defendants alleged (among other things), that the open and uncultivated lands adjoining or lying between inclosed or cultivated lands (being the lands which the crown claimed as waste lands) were pastured in common by the owners of the inclosed or cultivated lands, and were "*sheepwalks*," the various owners by arrangement among themselves, and in pursuance of an immemorial custom, appropriating (for the purposes of pasture) each of them a separate sheepwalk to himself, upon which he "settled" his own particular sheep; and the defendants further alleged, that since May 11th, 1836 (and also long prior thereto), the freehold and soil of the said open lands, and the slate mines and minerals within and under the same, had been adversely possessed by them and their predecessors in title,—However, the court decreed in favour of the crown, and (substantially) in the terms of the prayer, the evidence appearing to the court to show, that the crown had, at divers times, granted leases and licenses to private adventurers of the (slate) mines and minerals within the open or uncultivated lands,—so that the crown had

The private *rights of sheepwalks*,—not inconsistent with the crown's mining rights or title to the soil.

(*b*) (1864), Reported by Sir W. W. Karslake.

by its tenants exercised uninterrupted acts of ownership over the mines and minerals within and under the said open lands: And as regards the defendants' claim by adverse possession, no inference against the crown could be drawn from the pasturage rights, coupled even with the peculiar custom of settling sheep on particular sheepwalks,—*scil.*, because these pasturage rights were wholly consistent with the rights claimed by the crown, and not adverse to (or destructive of) the crown rights.

(*b.*) IN THE ISLE OF MAN.

Isle of Man,—mining rights of crown in.

Secondly, as regards the Isle of Man and the crown's title to mines therein.—The crown, by purchase from the lord of Man (who was originally a crown grantee of the lordship of Man), is entitled as lord (and in right of the crown) to divers rights in respect of the customary lands holden of the manor or situate within the manor; and, in particular, the crown is entitled to all the mines and minerals lying within or under such customary lands, and is entitled to work such mines and minerals by surface workings and otherwise, paying compensation for the surface damage. But the customary tenants are, by the customs of the manor, entitled to dig for and take and carry away the clay and sand within their tenements, and (apparently) in exclusion of the right of the crown to such clay and sand (*c*).

The lord's rights were declared in and by the saving clause contained in an Act of the year 1703 of the Parliament of Man,—by which saving clause there were excepted to the lords all such royalties, regalia, prerogatives, homages, fealties, escheats, forfeitures, seizures, *mines and minerals of what kind and nature soever*, *quarries and delfs of flagg*, *slate*, *or stone*, franchises, liberties, privileges, and jurisdictions whatsoever, as now are or at any time heretofore have been invested in the lords of the said Isle.

Customary mining rights,—exercisable by the private landowners.

The saving or exception and reservation in the Act of 1703 received a judicial interpretation in the case of *Attorney-General* v. *Mylchreest* (*d*), where it was held not to defeat (or to exclude) the customary rights of the tenants to dig and take the clay and sand within their tenements,—which customary rights were superabundantly proved in that case by long-continued acts of ownership, and (being customary rights) must necessarily have

(*c*) *Ballacorkish Mining Co.* v. *Harrison* (1873), L. R. 5 P. C. 49; *Att.-Gen.* v. *Mylchreest* (1879), 4 App. Cas. 294.

(*d*) (1879), 4 App. Cas. 294.

been in existence long before the Act of 1703. And it was pointed out in the same case (*e*), that the tenants were also entitled (not by the custom, but under the provisions of a supplemental Act passed shortly after the Act of 1703) to dig and take within their own tenements stone and slate, and also to dispose thereof, either for the use of their own tenements or for the improvement of their neighbours' tenements,—this latter right being, however, not exclusive of the lord's right to the same stone and slate under the saving or exception aforesaid.

Compensation for surface-damage,—liability of the crown to pay.

Where the lord exercises his mining rights, and in the exercise thereof damages the surface, he is (by the custom) liable to pay compensation for the damage so occasioned,—at all events, where the damage is surface damage occasioned by sinking pits through, or by creating a reservoir on (*f*), or by depositing minerals or spoil upon, the surface; but it is doubtful, if the compensation would extend to damage caused by subsidence, or if the lord (or his mining lessee) could lawfully create a subsidence of the surface. Also, the surface damage for which compensation is by the custom made payable, does not include damage occasioned to the surface by the drying up of wells of water, or of streams or springs of water fed by percolating water, and which the mining operations have dried up or diverted the course of (*g*). And where the compensation is for land taken for a permanent mining purpose, it is in the nature of purchase money, and is payable once for all (*h*); *secus*, where the compensation is for recurring and occasional damage (*i*).

(*c*.) IN DERBYSHIRE.

Derbyshire (certain parts of),—mining rights of crown in.

Thirdly, as regards Derbyshire:—The crown is seised in right of the duchy of Lancaster of divers manors within that county, and is entitled as lord to all the manorial mines,—including all the *lead* mines,—but subject (as regards the *lead* mines) to certain customs as to mining, which prevail over certain private manors within the county as well as over the crown manors, and by virtue of which customs anyone may work the lead mines subject to paying a royalty to the crown, and otherwise subject as is explained in the next following chapter. The crown mines are, in general, let to some crown-lessee thereof; and such crown-

(*e*) *Att.-Gen.* v. *Mylchreest* (1879), 4 App. Cas. 294, at p. 309.
(*f*) *Great Laxey Mining Co.* v. *Clague* (1878), 4 App. Cas. 115.
(*g*) *Ballacorkish Mining Co.* v. *Harrison* (1873), L. R. 5 P. C. 49.
(*h*) *Great Laxey Mining Co.* v. *Clague*, *supra*.
(*i*) *Williams* v. *Groucott* (1863), 4 B. & S. 149.

lessee holds, subject (as regards the lead mines) to the customary rights before referred to,—and subject also to certain rents and royalties payable to the crown (*k*), and which rents are recoverable by the crown by information at the suit of the Attorney-General,—*scil.*, by the Attorney-General of the realm, and not by the Attorney-General of the duchy (*l*).

(*d.*) IN THE FOREST OF DEAN; AND IN THE HUNDRED OF ST. BRIAVEL'S.

Forest of Dean and Hundred of St. Briavel's, —mining rights of crown in.

Fourthly, as regards the Forest of Dean and the Hundred of St. Briavel's in the county of Gloucester:—The crown is seised of the soil of the forest, including the mines and minerals within or under the same, but subject to the customary rights of the free miners therein; and is also seised of divers inclosures within the forest, which (while they remain inclosed) are not subject to any such customary rights. And the crown is also seised of the mines and minerals within the Hundred of St. Briavel's, subject to the customary rights of the free miners, — and which customary rights will be hereafter dealt with. The management of these estates of the crown is committed to certain commissioners, and is regulated by divers Acts of Parliament (*m*).

(*e.*) IN CORNWALL AND DEVON.

Cornwall and Devon,— mining rights of crown in.

And lastly, as regards Cornwall and Devon:—The crown is entitled, in right of the duchy of Cornwall, to divers manors within these two counties, and to all the tin mines therein (*n*),— but subject to certain customs as to mining which prevail throughout the two counties and not merely in the crown manors there, and by virtue of which customs, the *tinners* may (subject to certain regulations) work and get the tin mines paying a royalty to the crown. And the crown is also entitled, in right of the crown, to the sea-shore and sea-bed, and to all the mines and minerals thereunder,—but subject (where there is a Duke of Cornwall *in esse*) to the rights of that duchy under the Cornwall Submarine Mines Act, 1858 (*o*). But the *crown* rights to the mines in these two counties will be more conveniently treated of in the next following section, where the mining rights of the Duke of Cornwall are considered; and the

(*k*) *Case of Duchy of Lancaster* (1562), Plowd. 212; *Arkwright* v. *Evans* (1880), 49 L. J. M. C. 82.

(*l*) *Att.-Gen. Lancaster* v. *Devonshire* (*Duke*) (1885), 14 Q. B. D. 195.

(*m*) 1 & 2 Vict. c. 43; 24 & 25 Vict. c. 40; 34 & 35 Vict. c. 85.

(*n*) *The Case of the Stannaries* (1607), 12 Rep. 9.

(*o*) 21 & 22 Vict. c. 109.

rights of the *tinners* will be treated of, when we come to consider (in the next following chapter) the customary rights (as to *tin* mines) within the two counties.

(iii.) Management of crown lands and mines.

(*a.*) UNDER THE EARLIER STATUTES.

And as regards the crown lands generally (including the mines and minerals of the crown therein), the management thereof is now regulated by the statutes following :—

Leases,—for thirty-one years, or three lives ;

Firstly, by the statute 1 Anne, st. 1, c. 7, intituled "An Act for maintaining the honour and dignity of the Crown" ; and by that Act, after reciting that the land revenue for the support of the crown had from time to time been grievously diminished by the grants and alienations of former sovereigns, it was enacted (by s, 5), that in future every grant, lease, or other assurance by the crown of the crown lands (not being a repairing lease) should be absolutely void,—unless it was made for some term or estate not exceeding thirty-one years, or three lives, or for some term determinable on any number of (not exceeding three) lives, computed from the date of the grant, lease, or other assurance ; and unless it was at the ancient or most usual rent, or at a reasonable rent, not being less than one-third the annual value ;

and repairing leases,—for fifty years.

and (by s. 6), that a repairing lease might be granted for fifty years at a reasonable rent.

Building and repairing leases,—for ninety-nine years.

Secondly, by the 34 Geo. 3, c. 75, s. 3, whereby it was provided (in effect), that building and repairing leases of crown lands might be granted for ninety-nine years computed from the date of the grant, the repairing leases being at a rent of not less than two-thirds of the reasonable letting value of the existing buildings, and the building leases at a reasonable ground-rent—what was reasonable in each case being determined by the Treasury ; and no fine or premium was to be taken in either case ; and (by s. 19), provision was made for the surrender of subsisting leases, and for the re-grant of other like leases, for the like terms and under the like or reasonable conditions.

Mining leases, —and leases of quarry lands.

And with regard to mines, minerals, and quarries belonging to the crown,—In the leases to be granted thereof under the before-mentioned Acts, such share of the produce in kind, or such rent or duty upon the quantity or value of such produce, as the Treasury should think proper, might (by the 48 Geo. 3,

c. 73) be reserved in lieu of a money rent ; and divers simplifications in the leasing of crown lands, and provisions for the sale of certain crown lands and manors (s. 10), and for the exchange of crown lands (ss. 28, 29), and for the enfranchisement of copyhold lands held of crown manors (ss. 13—16) were thereby introduced.

(*b.*) UNDER THE MORE RECENT STATUTES.

The principal statute for the management of crown lands is, however, now the 10 Geo. 4, c. 50, which has consolidated the previous enactments. That statute places the crown lands in the management of the Commissioners of Woods and Forests (s. 8), subject to the control of the Treasury (s. 9) ; and, regarding the alienation and leasing of crown lands, provides generally as follows :—

Leases,—building and repairing.

Leases may be made for thirty-one years (s. 22),—and if for building or repairing purposes, then for ninety-nine years (s. 23), —garden-ground to accompany the buildings being lettable for the same term ; the leases may be in possession or in reversion (s. 26),—the lessees being made impeachable for waste,—excepting in the case of leases of mines, minerals, and quarries (s. 27) ; and, as a general rule, a rack-rent is to be reserved (s. 28) ; but, in the case of building leases, a nominal rent for the first three years, with or without a fine, is authorised (ss. 30, 31) ; and with regard to mines, minerals and quarries, either an annual money rent, or an annual money rent and such share of the produce in kind (or such rent or duty upon the quantity or value of the produce) as the commissioners think fit, may be reserved (s. 33).

Leases,—of mines and minerals.

Sales and exchanges.

Sales also of the crown lands may be made (s. 34), and the proceeds of sale are applicable as in the Act expressed (ss. 35—41) ; and exchanges, with or without money by way of equality of exchange, are authorised (s. 42—44), the lands received in exchange being made subject to the provisions of the Act as to sales (s. 51).

Mining leases,—for sixty-three years.

By the Crown Lands Act, 1873 (*p*), s. 4, the power of leasing given by the 10 Geo. 4, c. 50, is extended to enabling the Commissioners of Woods and Forests, with the consent of the Treasury, to grant (or agree to grant) leases of any mines, minerals, or other metallic or non-metallic substances or substrata obtained

(*p*) 36 & 37 Vict. c. 36.

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by mining, quarrying, or excavating, for any term of years not exceeding sixty-three years from the date of the lease (or agreement); and such term may be concurrent with the unexpired residue of any existing term; and every such lease (or agreement) is to be made upon such conditions and with such reservations by way of or in lieu of rent or other consideration, and to be subject to such covenants and stipulations, as the Commissioners, with the consent of the Treasury, shall approve,—nothing in the section applying to any mine of gold or silver.

(iv). Sea-shore and sea-bed,—Mines under.

Mines,—under the sea-shore and sea-bed:

And as regards the sea-shore and sea-bed, and the mines and minerals thereunder, the Crown Lands Act, 1866 (*q*), has provided (by s. 7), that all the rights and interests of the crown of and in the shore and bed of the sea, and of every channel, creek, bay, estuary, and navigable river of the United Kingdom as far as the tide flows (in the Act called, for brevity, the foreshore), shall, subject to the provisions of the Act and to the public rights, be under the management of the Board of Trade, in lieu of the Commissioners of her Majesty's Woods and Forests; but (by s. 21), the mines and minerals, under the foreshore, continue vested in the Commissioners of her Majesty's Woods, Forests, and Land Revenues upon trust for the Queen as such. And it is provided (by s. 2), that one moiety of the net annual income of the land revenue of the crown received in respect of any coal, ironstone, or mineral, stone, slate, clay, gravel, sand, or chalk, or of any substance obtained by mining, quarrying, or excavating, shall be treated as capital, and the residue thereof as income. And (by s. 22) all persons for the time being entitled, in right of or under the crown, to or to the management of any beds, seams, veins, mines, or quarries in or under the foreshore, or in or under any lands immediately adjacent thereto, and their respective tenants, may (subject to the provisions of the Act) enter into possession of, and use or pass over or under, any portion of the foreshore under the management of the Board of Trade,—in order to make or sink any pits, shafts, adits, etc., or embankments; or to make and place spoil banks, etc.; or to erect and repair steam and other engines, buildings, works, and machinery; or, generally, to do any such other acts as are for the time being necessary or convenient for working, searching for, digging, raising, carrying away, dressing,

Rights of working same,—paying compensation for surface-damage;

(*q*) 29 & 30 Vict. c. 62.

or making merchantable the coal, stone, or other minerals,—they first giving to the Board of Trade at least two months' previous notice in writing of the intention to exercise the powers of the Act, and doing as little damage as may be in the exercise of those powers, and making full compensation (to all persons interested) for all damage sustained by them by reason or in consequence of the exercise of such powers; but (by s. 23), nothing in the Act is to authorise any person to sink, drive, or make any pit, shaft, adit, etc., which will injure, weaken, or endanger, or be likely to injure, weaken, or endanger, any pier or other structure on or near the foreshore; and (by s. 24) the person for the time being exercising the powers conferred by the Act, is required to make and maintain all works and conveniences necessary or proper for the safety and accommodation of the public.

and not damaging piers, etc.

(v.) Management of crown's private estates.

By the Crown Private Estates Act, 1862 (*r*), the properties of the crown which are to be deemed private estates are (by s. 1) defined as being,—(1) All manors, lands, and hereditaments whatsoever, situate in England, Scotland or Ireland, or any of the dominions of the crown, already theretofore acquired by the Queen, or to be thereafter acquired by the Queen, her heirs, or successors, out of any moneys applied for the use of the privy purse, or any other moneys not appropriated to the public service; and also (2) All such manors, lands, and hereditaments whatsoever, situate as aforesaid, already theretofore come to the Queen, or thereafter to come to the Queen, her heirs or successors by gift, devise, or descent from any person not having been king or queen of England; and also (3) All such manors, lands, and hereditaments whatsoever, situate as aforesaid, that were the private property (legal or equitable) of the sovereign at or immediately before his or her succession to the throne. And (by ss. 5—11), the incidents of property in private hands are annexed to the private estates of the crown, in the fullest degree both of enjoyment and of liability. And by the Crown Private Estates Act, 1873 (*s*), all the above provisions are declared to extend and apply to all manors, lands, and hereditaments whatsoever which (under and by virtue of any gift, devise, or disposition made by her Majesty, or by any of her heirs or successors, of any part of her or his private estates) shall become vested in any person who

Private estates of crown,—varieties of.

Crown has all the powers of an absolute owner.

(*r*) 25 & 26 Vict. c. 37. (*s*) 36 & 37 Vict. c. 61.

may at the time of such vesting, or at any time afterwards, be or become king or queen of England,—unless (in and by the instrument giving, devising, or disposing of the same) an intention shall be expressed, that such manors, lands, or hereditaments shall not be, or after accession to the crown continue to be, held as such private estates ; and the heir, becoming entitled by devise, takes by the devise and not by the descent, as regards the private estates of the crown, equally as in the case of ordinary persons.

(vi.) Suits involving the rights of the crown.

Crown entitled to be plaintiff,—in all suits against the crown—lessees.

Where the crown claims to be entitled to mines within the lands of any subject,—with right to work and get the same by entry upon the surface and otherwise, paying compensation for the surface damage ; and the mineral lessee or licensee of the crown is sued in trespass by the surface owner for entering upon and breaking the surface,—the lessee or licensee may (after appearing in and before pleading to the action) procure the crown to intervene ; and in that case, the action will be stayed, and the whole matter determined in an action and information commenced by the Attorney-General on the relation of the lessee or licensee,—it being the right of the crown to be *dominus litis* or *actor* (*i.e.*, plaintiff) in any litigation affecting its rights (*t*).

SECTION III.—*Mining Rights of the Duke of Cornwall.*

Duchy of Cornwall,—creation of ;

When William the Conqueror created his half-brother Robert Earl of Cornwall, he gave him certain lands in Cornwall to go with the earldom ; and in the year 1215, when that earldom (together with the lands accompanying it, and which were thence called the earldom lands) had reverted to the crown,

and endowment of, with the duchy lands.

King John claimed all the minerals within the earldom lands, expressly recognising, however, that the lands (even when in the hands of the crown) were subject to the customary mining rights of the tinners in Cornwall. And in the reign of Edward the Third, when the earldom was erected into a duchy, the earldom lands came to be called (as they still are called) the duchy lands ; but the customary rights of the tinners remained unaffected.

Title to, and tenure of, the duchy and duchy lands.

The creation of the dukedom of Cornwall was by charter 11 Edw. 3, and the charter was confirmed by parliament ; and

(*t*) *Att.-Gen.* v. *Barker* (1872), L. R. 7 Exch. 177.

the grant of the dukedom and of the duchy lands thereby made was expressed to be,—to the said duke (Edward the Black Prince, eldest son of Edward the Third) and to the first-begotten sons of him and his heirs kings of England, and so as that the duchy lands should always accompany the said duchy, with reverter to the crown *toties quoties* when there should be no Duke of Cornwall, and a re-grant after each reverter *toties quoties* whenever there should appear a Duke of Cornwall.

(i.) The Duke's title,—character of, anciently.

The Prince's Case,—nature of the prince's title; and inalienability of the duchy lands.

And the true construction of this grant was determined in *The Prince's Case* (*u*),—being an action of *scire facias* to repeal certain letters patent of Queen Elizabeth, whereby she had purported to alienate the duchy lands. And in the judgment repealing the letters patent, the title of the Duke of Cornwall was explained as being of the following nature:—The title (it was stated) arises under a grant to which parliament assented; which mode of grant was necessary, inasmuch as the course of inheritance of the duchy lands is against the rules of the common law,—for he who is to inherit by force of the grant ought to be the *first-begotten son* and heir apparent of the King of England, and of such king as is heir to Prince Edward; and such first-begotten son and heir apparent *inherits in the lifetime of the king his father*; and that mode of grant was further necessary, because of the clause of revivification (re-grant) *toties quoties* after each reverter to the crown. And it was resolved, that the prince had an estate in fee simple in the dukedom, descendable to the first-begotten son of the heirs of the Black Prince (lineal or collateral), with the qualification annexed *that such heir should be of the King of England.*

Sutton Pool Case,—the prince cannot be disseised.

Also, in the *Sutton Pool Case* (*x*), which was an information of intrusion wherein the Prince of Wales (as Duke of Cornwall) claimed, on behalf of his lessee and as against the corporation of Plymouth and other persons, the water, soil, and pool of Sutton near Plymouth, and the houses, cellars, wharfs, quays, etc., erected upon the ground or soil of the said water or pool,—the court (in giving judgment for the Prince) said, that the Prince had under the charter an estate in fee simple,—succeeding not as heir to ancestor dying seised, but taking an estate of inheritance as *persona designata*, *i.e.*, as the eldest son and heir

(*u*) (1606), 8 Rep. 1.

(*x*) *Att.-Gen.* v. *Plymouth Corporation* (1794), Wightw. 148.

apparent of the king ; and the interest of the father ceasing, a new fee revived in the son as the person *in esse* within the designation of the charter ; and there could be no disseisin of such a fee,—nor could any title be acquired adversely thereto,—for the fee was inalienable. And in the *St. Aubyn's Case* (*y*), which was also an information of intrusion, the court stated, that (in effect) the fee which arises in the duke whenever a duke comes *in esse* is a fee discharged of all disseisins,—and is as full and complete a fee as when the duchy lands are vested in the crown.

THE ASSESSIONABLE MANORS,—AND THE CONVENTIONARY TENEMENTS.

Assessionable manors,—with the conventionary tenements.

Immediately prior to the year 1844, the present Prince of Wales, as being seised of the duchy of Cornwall and the possessions thereof, was entitled to (among other lands) the following manors, and which were usually called "*assessionable manors*," namely,—Firstly, Helston-in-Trigg, Talskedy, Penmayne, Liskeard, Tintagel, Rillaton, Restormel, Stoke Climsland, Penlyne, Trematon, and Penknell ; and, Secondly, Tewingten, Tywarnhaile, Tybesta, Helston-in-Kerrier, Moresk, and Calstock (*z*). And within the said manors, certain tenements, usually called "*conventionary tenements*," were held from the duke [under grants made and renewed at certain courts (called Assession Courts) holden under commissioners for that purpose, generally once in every seven years for the said manors respectively], upon payment of divers fines, acknowledgments, and fees, and subject to the payment and render of certain rents, heriots, and services, all surrenders of and admittances to the conventionary tenements being respectively taken and granted at courts held for the said manors respectively before the stewards or deputy-stewards for the same.

(ii.) Statutory ascertainment of the duchy lands, and of the rights of the duke, and of the conventionary tenants.

7 & 8 Vict. c. 105,—provisions of, for ascertainment of the conventionary tenements ;

And inasmuch as some uncertainty attached to the tenure of the conventionary tenements, it was provided, in the year 1844, by the 7 & 8 Vict. c. 105, intituled "An Act to confirm and enfranchise the estates of the conventionary tenants of the ancient assessionable manors of the duchy of Cornwall, and to quiet titles within

(*y*) *Att.-Gen.* v. *St. Aubyn* (1811), Wightw. 196.

(*z*) 7 & 8 Vict. c. 105 (schedule).

the county of Cornwall as against the duchy, and for other purposes," that the commissioners appointed by the Act should inquire and award, what were the conventionary tenements (with the boundaries thereof and the fines, fees, heriots, and other suits and services renderable for the same) which, at the date of the Act or within one hundred years before, were held upon the system of seven to seven years' grants, distinguishing which of such tenements had been so held for sixty years or more before the date of the Act ; and the commissioners were at the same time required to define also the waste and other lands (with the boundaries thereof) lying within the assessionable manors, and which (or the mines under which) belonged to the Duke of Cornwall ; and generally to define the boundaries of the said several manors, and what lands, mines, minerals, stone, substrata, and hereditaments within the said manors belonged to the Duke of Cornwall,—the Act providing (s. 32) that the award should not extend to or prejudice any claims to mines or minerals under the custom of *tin bounding* or any claims to *tin bounds*. And it was enacted (by s. 41), that all and singular the tenements which should be found in the award to have been conventionary tenements for sixty years or more before the date of the Act should become and be freeholds, subject to certain fixed annual payments ; and (by s. 42) that all and singular the tenements which should be found in the award to have been conventionary tenements for a less period than sixty years before the date of the Act should continue to form part and parcel of the manors of the duke, of which the same had theretofore been held ; and (by ss. 53, 54) that all mines and minerals in or under all and singular the tenements which at or within one hundred years prior to the date of the Act were conventionary tenements, and all mines and minerals, stone, and substrata in, upon, under, and of the waste and other demesne lands of the same manors, when the same should have been determined by the award to belong to the duke, should belong to him as parcel of his duchy lands. And (by s. 55) it was enacted, that it should be lawful for the duke, his agents and workmen, and his lessees and their agents and workmen, and all persons whom the duke should in that behalf authorise, and their agents and workmen, to enter into and upon all lands or tenements of any tenure held of the duchy manors or within their ambit, and to search for, dig, open, and work all or any the mines and minerals which should be found by the award to belong to the duchy, and to carry away and dispose of the same, and to erect all such buildings, steam

and for ascertainment of the waste lands ;

and for the ascertainment of boundaries.

Mines under the conventionary tenements,—and within and under the wastes,—made the property of the duke ;

with power to enter and dig, etc. ;

and with other extensive surface rights;

or other engines and machinery and things, and sink and make all such pits, shafts, levels, adits, air-holes, tram roads, and other roads and works, and to take from the said lands and tenements sufficient stone, lime, and slate for such buildings and other works, and to take, use, and divert all such water, and take and use all such room for ore and rubbish and other things, and do all such other acts and things upon, under, in, and about the aforesaid lands and tenements as should be necessary or convenient for working the same mines, and getting, washing, dressing, rendering merchantable, carrying away, and disposing of the same minerals, stone, or substrata, he the said duke or his lessees, or the persons authorised by him as aforesaid, making to the persons entitled to the surface of such lands or tenements adequate compensation for the damage done or occasioned by the exercise of the rights, privileges, and easements aforesaid, and making also to the persons entitled to the same adequate compensation for the materials so taken as aforesaid. But it was provided (by s. 60), that before the duke or his lessee or other person authorised as aforesaid should enter upon any lands (other than waste lands) to search for, dig, open, work, or get any mines or minerals, he should give one calendar month's previous notice in writing to the occupier of the surface of such lands. And (by s. 84), it was enacted, that the Act should not authorise the commissioners to inquire into, or should in anywise prejudice, any lawful right, profit, privilege, or easement to which the *tinners* of the county of Cornwall were or claimed to be entitled as such tinners under or by force of any statute, custom, prescription, or royal charter; and the Act (by s. 86) expressly excepted from the authority of the commissioners the determination of any question regarding the soil of or the mines and minerals lying under the sea-shore, between high and low water marks, within the county of Cornwall, or under any estuaries, tidal rivers, and other places of the like character, below low water mark, being in and part of the county.

the duke (or his lessees paying compensation for surface-damage;

and the rights of the *tinners* being preserved.

7 & 8 Vict. c. 105,—the award under.

The commissioners in due course made their award, and such award was confirmed by the 11 & 12 Vict. c. 83.

SEA-SHORE, AND SEA-BED.

And subsequently, by the Cornwall Submarine Mines Act, 1858 (21 & 22 Vict. c. 109), it was enacted, that all such mines and minerals situate between high and low water

mark and under estuaries, etc., being part of the county (and whether adjacent to the duchy possessions or not) (*a*) should be vested in the Duke of Cornwall, as part of the soil and territorial possessions of the duchy,—these provisions of the Act not extending to the mines and minerals lying below low water mark or under the open sea, adjacent to, but not being part of, the county,—all which latter mines and minerals therefore remain vested in the crown. And as regards all such last-mentioned mines and minerals, the crown is given power to take or use, or to pass through over or under, any lands for the time being of the duchy within the county, either in the occupation of tenants under leases or agreements made subsequently to the date of the Act, or in the occupation of the Duke of Cornwall for the time being, for all the usual mining purposes, on giving two months' previous notice, and making compensation to the duke and to all persons interested.

Sea-shore,—mines under, in duke.

Sea-bed,—mines under, in crown.

(iii.) The statutes of limitation,—as applicable between the duke and others.

By the 7 & 8 Vict. c. 105, it is provided (as regards the assessionable manors and the lands belonging thereto), that the Duke of Cornwall shall not at any time thereafter sue for the recovery of any surface lands, by reason of any right or title which hath not first accrued within the space of sixty years next before the commencement of the action or suit (s. 71); and shall not sue for the recovery of any mines or minerals in, upon, or under the lands, where such lands shall have been held or enjoyed without interruption for a period of sixty years or more before the commencement of the action or suit,—*scil.*, if the mines or minerals have been substantially worked and gotten at any time during the said period, by the person who has so held and enjoyed the said lands, and have not at any time during the said period of sixty years been worked and gotten, or the royalties, etc., thereof received and enjoyed, by the duke (s. 73); and further, the duke shall not sue any person for or concerning any mines or minerals in, upon, or under any lands, etc., situate in the county of Cornwall, when such lands, etc., shall have been held or enjoyed by any person (other than the duke) for a period of one hundred years before the commencement of the action or suit,—*scil.*, where such mines and minerals shall not have, at any time during the said one hundred years,

Sixty years' limit of time,—for suface-lands, and for the mines thereunder (if at any time worked);

and one hundred years' limit of time,—as regards other mines.

(*a*) *Penryn* (*Mayor*) v. *Holm* (1877), 2 Ex. D. 328.

been worked and gotten, or the royalties, etc., thereof received or enjoyed, by the duke (s. 74).

Nullum Tempus limit of sixty years, —otherwise applicable to the duke as to the crown.

And as regards all other lands alleged to belong to the duchy (that is to say, lands other than the lands and mines within or under the said assessionable manors), it is enacted, by the 23 & 24 Vict. c. 53, that the Nullum Tempus Act (*b*) shall apply to these lands as fully as the same Act applies to the sovereign, and in like manner (*mutatis mutandis*) as if the duke were mentioned in the last-mentioned Act in all places where the sovereign is mentioned or referred to,—the limit of time prescribed by the Nullum Tempus Act being sixty years ; and by the 24 & 25 Vict. c. 62, it is further provided, as regards both the sovereign (s. 1) and the prince (s. 2), that (in effect) neither of them shall bring any suit for any manors or hereditaments (other than liberties or franchises) after sixty years' adverse enjoyment next before such suit, by reason only that the same manors and hereditaments shall have been in charge to the crown or to the duke, their respective predecessors or successors, or shall have stood *insuper of record* within the said sixty years.

The duke is, *semble*, like the crown also in other respects.

According to the decision in *Lambert* v. *Taylor* (*c*), the crown, when not expressly mentioned in any Statute of Limitations, is not bound thereby ; and the principle of that decision may possibly apply also to the Duke of Cornwall ; but the privilege of the crown, and (if it exists) of the duke, appears to be a *personal* privilege confined to themselves, and which does not extend to any purchasers or other persons claiming under them (*d*). And possibly, also, the Duke of Cornwall is (like the crown) entitled to be actor in any litigation (*e*).

(iv.) Management of duchy lands and mines.

And as regards the duchy lands generally (including the mines and minerals therein), the management thereof is now regulated by the following statutes :—

7 & 8 Vict. c. 65,—sales and enfranchisements under.

Firstly, by the Duchy of Cornwall Act, 1844 (*f*), general powers were given for the sale of the lands of the duchy, and for the enfranchisement of copyhold and customary lands held of the duchy ; and it was provided (s. 2), that every enfranchisement should be made subject to (among other things) the right

(*b*) 9 Geo. 3, c. 16.
(*c*) (1825), 4 B. & C. 138.
(*d*) *Doe* d. *Wall* (*aliter Watt*) v. *Morris* (1835), 2 Scott, 276.
(*e*) *Att.-Gen.* v. *Barker* (1872), L. R. 7 Exch. 177.
(*f*) 7 & 8 Vict. c. 65.

and power to enter, get, carry away, and dispose of the mines and minerals excepted or reserved upon the enfranchisement.

26 & 27 Vict. c. 49,—sales and enfranchisements,—and also leases and exchanges,—under.

And, Secondly, by the Duchy of Cornwall Management Act, 1863 (*g*), provision has now been made for the sale of any lands of the duchy; and for the enfranchisement of any copyhold lands held of the duchy; and for the leasing of duchy lands (including the mines and quarries, whether opened or unopened, therein); and for the licensing of copyholders of the duchy to demise their lands; and for the exchange of minerals in or under duchy lands, and with or without the surface, in pursuance of, and for the purposes of, the General Inclosure Acts, the specific provisions of the Act being to the effect following, that is to say:—

(1) Sales enfranchisements.

By s. 3, the duke is authorised to dispose of, at any time, by way of *sale* or (in the case of copyhold and customary lands) by way of *enfranchisement*, any lands of the duchy (*h*), subject to any reservations, and in consideration either of a gross sum or of an annual sum, or of both, the annual sum to be commensurate in duration with the estate disposed of, and to be charged upon the lands aliened; and (by s. 8), all gross sums of money to be received on any such disposition as aforesaid may be applied (after satisfying the costs, charges, and expenses of sale or enfranchisement) in the payment of the purchase-moneys for any manors, lands, or hereditaments, mines or minerals or rights of mining, and otherwise in or towards the general improvement of the existing duchy lands. Also, by s. 21, it is rendered lawful for the duke under seal of the duchy to *demise* any manors, lands, and hereditaments (including mines and quarries, whether opened or not, with power for the lessee to work, get, carry away, and dispose of the minerals found therein, and to do all acts necessary or expedient for working, getting, carrying away, and disposing of the same minerals or any of them) for any term or terms of years not exceeding thirty-one years in possession but not in reversion,—so that upon every such demise, when the subject-matter thereof shall consist of mines or minerals, there shall be reserved a reasonable amount of rent, royalty, dues, toll, or dish, without taking any fine or consideration in the nature of a fine; but by (s. 23), fines may be taken in special cases; and (by ss. 26—28), provision is made for the surrender of old upon

(2) Mining leases,—with surface rights.

(*g*) 26 & 27 Vict. c. 49.

(*h*) The limit of 31 years originally imposed by s. 3 was removed by the 56 & 57 Vict. c. 20.

(3) Exchanges.

the grant of new leases. And (by s. 41), it is prescribed, that the powers vested in the Inclosure Commissioners for England and Wales by the Inclosure Acts shall, as to any exchange affecting the possessions of the duchy, be deemed and construed to authorise a dealing, for the purpose of such exchange, with mines and minerals and rights in respect of mines and minerals, either with or without any dealing with the ownership of the surface.

Section IV.—*Mining Rights of Foreign States.*

As regards the mining laws of foreign countries, a general outline of their leading principles is, for many reasons, desirable in any book on modern mining law that aims at completeness and practical utility; and these mining laws, being, in their general features, not very dissimilar to each other, admit of a combined treatment to a considerable extent,—although the details of foreign mining laws do not admit of any such treatment.

Similarity to Roman Law.

Foreign mining laws, —have possibly originated from the Roman law.

The mining laws of foreign countries have been derived from,—or, at all events, betray an otherwise unaccountable similarity to,—the Roman law, as their principal and original source. For, by the Roman law, as we have already seen, the *dominium strictum*, — *i.e.*, the ownership proper of all lands, and therefore also of all mines and minerals, — was vested in the State, that is to say, in imperial times, in the emperor; and the private landowners, so called, were only the *possessores* of the land, entitled indeed to permanent estates and interests therein, but whose estates amounted at their best to the *dominium utile* only,—being an ownership which the possessor could claim against all the world, other than and except the emperor, in the same way that the copyholder of inheritance may claim, that he is seised of his copyhold tenement as against all the world, saving and excepting only his lord. And it appears, that, just as in copyhold lands the mines and minerals remained the property of the lord, although they might be in the possession of the tenant, so in all lands that were subject to the Roman law the mines and minerals of every kind were originally retained by the emperor in himself and

as portion of his demesne. And when subsequently the mining rights of the emperor, after divers mesne relaxations thereof, were ultimately fixed by the decree of the Emperor Gratian, and the confirmations of that decree that were made by subsequent emperors, they were exclusive of any rights or interests of the subject in respect of the gold and silver mines ; and as regards all other mines and minerals, were measured by the *Canon Metallicus*,—whereby (subject to the due render of the proportion of mineral thereby ascertained, and which was usually one-tenth) the residue of these last-mentioned minerals was the property of the subject,—the landowner mining in his own lands free of all other charge or render, and the adventurer mining in the lands of others rendering to these others a further proportion of the produce, and which was usually one other tenth.

Resemblances to the Roman law :—

Now the mining laws of foreign countries resemble, in many particulars, the mining laws of imperial Rome ; and for the purpose of better showing these resemblances, it is convenient to consider, firstly, those countries which have been of distinctly Latin origin ; and to take, secondly, the Teutonic nations, and thirdly, the Sclavonic nations, and lastly, the United States of America.

(*a.*) In Countries of Latin Origin.

In countries of Latin origin :

And, firstly, in France, Spain, and Italy, being the three chief countries in Europe of directly Latin origin, we find that the law of mines presents the following general features of similarity, that is to say,—the right of property and of possession is in the State, and not in the subject ; and the State may enter and work all mines, minerals, and quarries by its own servants ; or (and this is the more constant practice) it may grant them as a *concession*, either to the landowners in whose lands they are situate, or to any adventurers whatsoever, whether citizens or foreigners, upon certain terms, including a render to the State, and including also compensation to the private landowner for surface damage.

(1) France.

Thus, in the case of France, although by article 552 of the Code Civil or Code Napoleon the landowner is declared to have the right to everything above and everything below the surface, and to have the liberty to extract from his pits and quarries (*fouilles*) whatever produce they are found to yield, yet the right and liberty in question are in the now-stating article

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IMPERIAL MINING RIGHTS.

expressed to be (and are thereby declared to be and made) subject to the statutes and regulations regarding mines that are therein referred to; and under the principal statute therein referred to, being the law of April 21st, 1810, the property in mines and minerals is declared to be in the State, and mines cannot be explored, *i.e.*, worked, excepting by concession from the State,—the landowner himself even requiring to obtain such concession. The last-mentioned statute is to be read, however, in a manner that is consistent with the unrepealed statute of July 28th, 1791, which recognises a right in the landowner to all mines and minerals within one hundred feet from the surface; consequently, within that distance, mines and minerals,—and, therefore, also quarries,—may be worked by the landowner without any concession from the State (*i*).

1a) Belgiu

As regards the small State of Belgium, contrary influences have been at work; that is to say,—On the one hand, the Latin jurisprudence has been largely introduced into the mining law of Belgium through the proximity of that country to France, and from the circumstance that the French law has at different times prevailed in Belgium; and, on the other hand, the Teutonic spirit of the people has asserted itself not ineffectively in certain provinces,—*e.g.*, in Liege, where popular mining rights analogous to the mining customs of Cornwall, etc., have been established; and in Hainault, where the private landowners have asserted privileges almost as exclusive as those of the landowners in England. But at the present day, the working of mines in Belgium is almost entirely regulated by modern statutes, which recognise (1) the right of the crown to grant mining concessions; (2) the rights of every adventurer to work mines, paying compensation to the landowner for surface damage; and (3) the preferential rights of the landowner himself to work in his own lands for his own benefit, subject only to the control of the State (*k*).

(2) Spain.

And in the case of Spain, the successive mining ordinances of that country represent the sovereign as laying constant and exclusive claim to all mines and minerals whatsoever, whether gold and silver or other and baser mineral substances, and wherever situate, whether in the public lands or in the lands of private landowners. And the more modern legislation of the country has not materially departed from the assertion of these exclusive claims; thus, in the legislation regarding mines, of

(*i*) See Dalloz on Mines; Merlin's Répertoire de Jurisprudence.

(*k*) See Dalloz; Chicora's Mining Jurisprudence.

July 6th, 1859, all mines and minerals are declared to be the property of the State, and no subject has any right to work them save under a concession from the State,—the only relaxation of the crown rights, that the now-stating legislation seems to make, being the exception of metals found in scanty and casual amounts, and the exception of stones and stone-like substances used for building and similar purposes. But this legislation requires (and apparently for the first time requires) the crown grantee to make compensation for surface damage to the surface owner. And under the still more recent legislation (that of the years 1868 and 1871), the same general rights or claims of right in the crown are re-asserted, although (from the desire of the king to revive the industries of the State, and among them its mining industries), a much greater facility of concession has been provided (*l*).

(3) Italy.

And in the case of Italy, the law appears to have been simply that of the decree of Gratian, occasionally modified in particular States, but the modifications invariably being in extension of the rights of the governing prince. It was not, however, until the present century, that the mining industries of Italy received any considerable development ; and most of the extant legislation regarding them dates from some time subsequent to 1800. That legislation, although it exhibits foreign, and principally English, influences of a more liberal tendency, yet remains true in its general features to the ancient Roman law, as formulated in the decree of Gratian,—reserving the ownership and control of minerals to the State, and permitting the working of them to the subject only as a concession from the State, and upon certain terms, including a render to the State. Thus, under the mining legislation of 1859, and which is applicable to the greater part of Italy, including the island of Sardinia, mines and minerals may be granted by the State as a concession, the grantee rendering to the State a fixed return or rent of 20 centimes per acre, and also a proportional (or tonnage) rent of five per cent. on the net amount of mineral produced, and paying also to the surface owner compensation for surface damage.

(2a) Mexico.

Again, in the foreign countries that have been settled or colonized by Spain, and which formerly were (and some of which still are) the possessions of Spain, the same general features of mining law were introduced and still to a large

(*l*) See Gamboa's Mining Law.

extent prevail, *e.g.*, in Mexico and in South America generally. Thus, in Mexico, the ancient Spanish law substantially prevails, asserting in the sovereign (or sovereign republic) an exclusive right to every species of mineral, and granting that right to the subject by way of concession only ; and the subsequent changes in the character of the government have not, even to the present day, materially altered or affected the ancient law. Brazil presents the like general agreement of its mining laws with those of Spain.

(2b) Brazil.

(*b.*) In the Teutonic Countries.

In the Teutonic countries,—and in particular in Germany.

Secondly, in the case of Germany, where liberty has been more vigorous, and the emperor has not unfrequently allied himself with the people in opposition to the sovereign princes, we find that the imperial mining rights were not of the like extensive or exclusive kind which we have seen accorded to the sovereign in countries of an exclusively Latin origin, but yet presented unmistakable resemblances to those latter rights in very considerable degree. Frederick Barbarossa was the first emperor that distinctly formulated the imperial mining rights in Germany, and he appears to have accepted the decree of Gratian in its general features, reserving one-tenth of the net produce to the State. The imperial rights in respect of mines appear to have become at some subsequent but uncertain date—probably by successive grants from the emperor—vested in the sovereign princes of the different kingdoms and principalities ; and to have submitted consequently to many variations of amount in the different mining districts, but in each of them the mines and minerals of the country were maintained to be *inter regalia*. The sovereign princes also made concessions of the right of working them to adventurers generally, whether citizens or foreigners, the grantee rendering certain and uncertain renders to the crown. In Prussia, the mines and minerals are the property of the State, which the State may (and also does) grant to private individuals (not being necessarily the landowners or even citizens of Germany) upon terms, the principal of which are the render to the crown of two per cent. of the mineral produce, and the payment to the surface owner of compensation for surface damage. But in certain cases, adverse possession or other mode of acquisition has divested the right of the crown, and vested the mines and minerals in the private citizen or subject. In Austria, the like general law prevails, the imperial mining rights having been

(1) Prussia.

(2) Austria.

admitted in the ancient laws, and being re-asserted in the modern legislation of the present century, excepting where adverse possession or other mode of acquisition has divested the imperial rights, and excepting so far as the desire to encourage mining industry has made a difference in favour of the subject.

(*c.*) IN THE SCLAVONIC COUNTRIES.

In the Sclavonic countries.

Thirdly, in the case of Russia, it is uncertain whether the imperial mining rights ever at any time recognised the principle of the decree of Gratian ; and this at least is certain, that, at the present day, the imperial rights are confined to mines and minerals situate within the public domain alone, the private landowners having asserted an exclusive right to all mines and minerals whatsoever, situate within their own private domains, even to the gold and silver mines situate therein, the government exercising over these last-mentioned mines only the exclusive right of coinage. Consequently, in Russia, the State as regards the minerals within its domains, and the private landowner as regards the minerals within his domains, each of them independently of the other, make grants or concessions of the mines, by way either of lease or license at their own pleasure, or work the minerals by themselves directly by their own servants, and for their own respective proper benefit.

(*d.*) IN THE UNITED STATES OF AMERICA.

In the United States of America.

Fourthly, in the United States of America, and as a consequence apparently of the laws of the union having had their origin in the English laws which, prior to 1776—82, prevailed in the States, all ownership in land (and consequently in minerals also) is, in theory at least, derived from the government, as the successor of the feudal suzerain. But, subject to that general ownership, the individual States have, each of them for itself, regulated in a more particular manner the ownership of the precious and other minerals situate within the State. Consequently, the law of mines and minerals in each particular State is to be discovered from the statutes that have been enacted by the legislature of the State, subject (where subject) to the relevant federal legislation (if any) ; and a very considerable diversity prevails in the different States regarding the ownership of minerals. Thus, in Pennsylvania, the law, like that of Russia, assigns that ownership, as well in the precious metals

(1) Pennsylvania.

(2) California.

(3) Georgia.

(4) New York.

as in all other minerals, to the private landowner ; while in California, the mines of gold and silver, as in England, belong in theory at least to the sovereign, *i.e.*, federal government ; but a grant of lands in that State by the federal government, unlike the corresponding grant in England, carries with it, as does also the like grant by the State of Georgia of lands in Georgia, the precious metals and all other minerals. Again, the laws of the State of New York reserve to that State all mines of gold and silver, and also all mines of other minerals containing gold or silver in which the proportion of the baser metal is under two equal third parts ; and as regards all other mines, being the mines of baser substances, these belong to the private landowner ; or, if situate in the public domain, they belong to the State,—so that New York presents an almost complete similarity (in these general features of its mining law) to the mining law of England. In the other States of the Union, there appears to be a corresponding diversity of mining law. The supreme legislature has not materially interfered with the local mining laws of the individual States, but as regards the mines within those portions of the lands within the particular States that are public domain, it has provided for the exploration of such mines, and for the winning and working of the minerals that may be discovered therein, by special grant thereof (or, as it is called, mining patent), the grant providing for a certain or uncertain render to the federal government, and also providing compensation for surface damage (*m*).

(*m*) See Harris on Titles to Mines in the United States (1877).

CHAPTER VII.

CUSTOMARY MINING RIGHTS:

OTHERWISE, CUSTOMARY OWNERSHIPS IN MINES.

Customary mining ownerships, —varieties of.

As indicated in Chapter III., wherein we treated of mines and minerals within or under the copyhold lands holden of the manors of private lords and within or under the waste lands of such manors, divers mining rights are, by virtue of the customs of such manors, enjoyed by the copyholders and other customary tenants ; but the customary mining rights which it is proposed to now consider are those which prevail,—as to the tin mines in Cornwall and Devon ; and as to the lead mines, in certain parts of Derbyshire ; and as to mines generally, in the Forest of Dean and in the Hundred of St. Briavel's, in the county of Gloucestershire, — and to which customary mining rights, occasional reference has been made in the last preceding chapter.

Section I.—*Tin Mines in Cornwall and Devon.*

Tinners,—customary rights of, recognised by King John, and by King Edward I.

The customary rights of the tinners in Cornwall and Devon were recognised by King John,—the claim which he made to the lands annexed to the earldom of Cornwall, and which lands had then reverted to the crown, having been made subject to and with a full and express recognition of these customary rights. And the customary rights of the tinners were recognised also by King Edward I., when he granted his charter of liberties (33 Edw. 1) to the tinners of Cornwall, and a like charter (33 Edw. 1) to the tinners of Devon,—by which two charters also, courts or parliaments (called the Stannaries) were established for the two counties, for the convenience of the tinners ; and by these charters the tinners were also declared exempt (save in matter of land, life, and limb) from the jurisdiction of the ordinary courts of justice. And ever since the charters of 33 Edw. 1, the customary rights of the tinners have been declared and maintained or enforced by the Stannary

courts so established,—subject always, of course, to the control of the imperial parliament (*a*).

The stannary court,—and its modern substitute, the county court of Cornwall.

By the 6 & 7 Will. 4, c. 106, s. 6, the two stannaries were consolidated into one court; and that consolidation was afterwards maintained by the successive Stannaries Acts, 1855, 1869, and 1887 (*b*); and the united court has now, under the provisions in that behalf contained in the 59 & 60 Vict. c. 45, been merged in the county court of Cornwall, as holden at Truro in that county,—the Stannaries' jurisdiction of that county being, however, kept distinct (for certain purposes) from its ordinary jurisdiction,—*scil.*, so far as the new jurisdiction is in excess of the ordinary limits of the jurisdiction of a county court, *semble*.

TOLL-TIN.

Tinners,—payment of *toll-tin* by.

Under the customs as thus from time to time ascertained, the right of working tin mines was conferred upon all free tinners, subject to the render,—at least, in the county of Cornwall, although perhaps not in the county of Devon,—of a certain proportion of the minerals raised to the lord or other owner of the soil; and which proportion was called the *toll tin*, and was usually one-fifteenth of the produce, although by particular custom it might be one-tenth; and subject to that render, any tinner was allowed to bound (*scil.*, to appropriate) any unappropriated *waste* lands, or any several or inclosed lands *which had formerly been waste land subject to the custom*,—the assessionable manors and conventionary tenements of the duchy of Cornwall being also subject to the custom (*c*); and the area so appropriated was called a *tin bound*.

TIN-BOUNDS.

Tin-bound,—size and shape of, and maintenance of.

A tin bound consists usually of about an acre of land; and is required, in general, to have four corners, and to be defined by twenty-four turfs or stones, six to each corner; but there are also triangular bounds, called side bounds (*d*). Every bounder is required to proclaim at three successive courts the date of his possession, the names of his partners, and the limits of his bound; and any person disputing the title of the bounder must

(*a*) 16 Car. 1, c. 15; *Rowe* v. *Brenton* (1829), Conc. 80; 3 M. & Ryl. 133; *Rogers* v. *Brenton* (1806), 10 Q. B. 26; 17 L. J. (N.S.) Q. B. 34.

(*b*) 18 & 19 Vict. c. 32; 32 & 33 Vict. c. 19; 50 & 51 Vict. c. 43.

(*c*) 7 & 8 Vict. c. 105, ss. 32, 84.

(*d*) Conv. 2 Jac. 2, 2.

forthwith proceed to resist it by an action of trespass. Notice in writing of the cutting was originally required to be given to the owner of the soil, or his agents, within one year (*e*); and the toll tin was to be delivered within three years, and the bound was to be effectually worked (*f*); but afterwards three months' notice in writing, previous to the cutting, was required to be given to the owner of the soil,—who, if he thought fit, might (within the three months) proceed himself to cut the intended bound to his own use ; and failing that, the bounder might, upon proof of the notice, and after the three months, cut the bound in the usual way (*g*).

Tin-bound,—nature of tinner's title to.

If the claim of the bounder was not successfully resisted, he became in due course entitled to his writ of possession ; and his right then became an absolute right,—and (in the county of Cornwall) the tin bound so acquired was a chattel real, and devolved upon the legal personal representative (*h*); but (in the county of Devon) the tin bound was real estate, and devolved upon the heir of the tinner (*i*).

If the bound remained unworked for twelve months, any other tinner might, on notice to the owner and declaration on oath of the limits, etc., be permitted to work the bound, on payment of the usual toll-tin, and upon giving a bond for the effectual and proper working of the bound ; and on breach of the bond, the owner might enter again (*k*).

Tin-bound,—annual renewal of.

All bounds required to be renewed annually (*l*),—the ceremony of renewal consisting in cutting a turf from each corner of the bound, and placing it on the adjacent hillocks, and declaring in whose name the bound was renewed ; but although the day for the renewal had passed, the bound might still have been renewed after the day, provided no tinner had meanwhile made a new title to it (*m*).

Produce of tin-bound,—exemptions of.

The tinner was exempt from all taxes and tolls in selling his tin at fairs and markets (*n*) ; and his profits were not subject to tithe (*o*).

(*e*) 22 Jac. 1, 17; 11 Cha. 1, 15; 2 Jac. 2, 1.
(*f*) 16 Geo. 2, 8.
(*g*) 26 Geo. 2, 4.
(*h*) 2 Jac. 2, 4.
(*i*) 2 Hen. 8, 21; 25 Hen. 8, 1.
(*k*) 11 Cha. 1, 31; amended 26 Geo. 2, 8.
(*l*) *Ibid.* 2.
(*m*) 22 Jac. 1, 18.
(*n*) 22 Jac. 1, 14; 16 Car. 1, 15.
(*o*) 22 Jac. 1, 16; 11 Car. 1, 14.

CHAP. VII.

CUSTOMARY MINING RIGHTS.

DEMISES, SUBJECT TO FARM-TIN.

Demise (or *sett*) of tin-bound,—subject to payment of *farm-tin*.

The owner of a tin bound who has been in possession for a year and a day cannot be dispossessed or disturbed by any order, injunction, or other proceeding save only by verdict (*p*); and he may (as lessor) demise the bound to others, subject to the payment to himself of *tin dues*,—the bound still continuing liable to the render of the *toll tin* to the owner of the soil, and the bounder himself remaining responsible for its render. The tin dues (otherwise called *farm tin*) consist of one-twelfth, —or, by peculiar custom, one-tenth,—of the remainder after the toll tin is paid; and the owner of the soil may himself elect to take the bound, subject to the usual payment (*q*).

Lessee's title, —under a customary sett, nature of.

If the bound is let for an undefined period, even by parol, and the lessee has been in possession for a year and a day, his term is indefeasible and perpetual,—so long as he complies with the requisitions of the customs; but any person taking a set or lease who does not effectually prosecute the works, is liable, by the custom, to the forfeiture of his interest (*r*).

WATERCOURSES AND OTHER WATER RIGHTS.

Water rights of tinners.

No tinner may pollute or divert any waters used for domestic purposes or for any ancient mill; and any person polluting any running water out of malice is liable to a penalty (*s*); and if any lands be overflowed by stones and gravel (from the tin workings being suffered to fall into rivers), and the streamer does not (upon two days' notice) clear the river so as to prevent the overflow, he is liable for the damages occasioned, and also to a penalty (*t*). But subject to these (and some few like) restrictions, the right of every tinner to divert water for the use of his tin bound is affirmed in the charters of Edw. 1, above referred to,—"*divertere aquas—sicut consueverunt*"; and in *Ivimey* v. *Stocker* (*u*) a prescriptive or customary claim to have an artificial watercourse maintained for the use of the tinners was upheld.

Adits,—right to construct.

Also, by the customs, the tinners may carry adits for water through the bounds of any other persons without leave, all tin which may be there discovered being left for the owners

(*p*) 22 Jac. 1, 21; 11 Cha. 1, 18.
(*q*) Basset's Letter on the Bounding Custom, 1839; Pryce's Min. Cor., chap. iii.
(*r*) 16 Geo. 2, 14.
(*s*) 26 Geo. 2, 12.
(*t*) *Ibid.* 13; Pearce, 154.
(*u*) (1866), L. R. 1 Ch. App. 396.

of these bounds ; but this custom extends only to waste lands, and not to lands held in several or private ownership and inclosed ; and the custom, in order to be valid, must be reasonable, and also reasonably exercised ; and otherwise, it will be void and non-existent as a custom (*x*).

EJECTMENT FOR TIN-BOUND.

Ejectment,—for recovery of tin bound.

Ejectment lies for the recovery of the possession of tin bound, for it is a corporeal possession (*y*) ; but in *Doe* d. *Falmouth* v. *Alderson* (*z*), which was an ejectment by the surface owner against a tin bounder (*i.e.*, against a tinner in respect of his tin bound), it was considered that the "*tin bound*" was (for the purposes of that action) more properly described as a "certain *mine* within and subject to the *customs* as to tinners,"—the phrase "*tin bound*" referring rather to the mode of acquisition of the mine than to the mine itself when acquired thereby.

SALE, MORTGAGE, ETC., OF TIN-BOUND.

Sales and other alienations,—by tinner, of his tin-bound.

The title of the tinner continuing so long as the mine is actually worked by him, and is annually renewed, he may deal with his bound by sale, mortgage, and otherwise ; and the lease of a tin bound is commonly called a "sett" ; but a mere purported renewal, unaccompanied by actual working, will not suffice to keep alive the title of the tinner to his tin bound. And it was considered in *Rogers* v. *Brenton* (*a*), that the actual working of the tin bound by the tinner himself or by his lessee or agent was the material circumstance which made the custom of tin bounding a reasonable custom,—*scil.*, because otherwise the surface ownership would be without any reason (that is to say, unreasonably) interfered with. However, a *bonâ fide* working need not be continuous,—but may for sufficient reason be intermitted for a time,—although if the working is once definitely abandoned, the title of that particular tinner ceases with such abandonment ; and the surface owner is, in such a case, free of the bound, until such time as another tinner may (and he lawfully may) take up the bound ; but, *semble*, the original tinner may himself resume the bound, provided he do so before any other tinner (or the surface owner) has done so.

(*x*) *Bastard* v. *Smith* (1837), 2 M. & Rob. 129.

(*y*) *Vice* v. *Thomas* (1842), Smirke, 35.

(*z*) (1836), 1 Mee. & W. 210.

(*a*) (1846), 10 Q. B. 26 ; 17 L. J. (N.S.) Q. B. 34.

LEASES OF TIN MINES BY LANDOWNER.

Leases of tin mines,—by the landowner, are common law (and not customary) estates.

However, even in the counties of Cornwall and Devon,—as in other counties,—the owner of lands in which mines (of tin) are, is entitled to work them, irrespectively of the customs,—*scil.*, when they are not in the effective possession of any tinner. The customary right of the tinner is, in fact, in the nature of an adverse right,—the landowner not being able to exclude the tinner (who complies with the custom) from working the tin, and being only entitled to the customary render of portion of the ore gotten; but subject to that customary right (*b*), the landowner may lease his (tin) mines to anyone, or may license anyone to get the (tin) mines,—equally as he may do in places which are not situate within Cornwall or Devon at all; and where the tin mines in Cornwall and Devon are worked by companies, they usually obtain such a lease or license; and, of course, the lease or license confers common law rights, as distinguished from customary rights (*c*).

TINNERS,—PRIVILEGES OF.

As to suing and being sued.

All labouring tinners, dressers, and smelters, and all other persons actually employed in the tin works,—*scil.*, while so actually employed,—were called *privileged tinners* (*d*); and privileged tinners who had discontinued working, and all owners of tin works and mining adventurers and purchasers of tin, and all others that intermeddled with tin, were called *tinners at large* (*e*). And as regards all causes of action arising within the Stannaries, or relating to tin or tin works, the privileged tinner could only sue and be sued in his own court; although as regards *foreigners*,—that is to say, strangers to the Stanneries,—the suit might, at the election of the plaintiff, be either in the local court or in the High Court (*f*).

JURISDICTION OF STANNARIES COURT.

Stannaries court,—jurisdiction of, limit to.

But by the 16 Car. 1, c. 15, s. 4, if any defendant to an action in the local court swore that he was not a tinner, he was to be discharged,—unless the plaintiff swore that he was a true

(*b*) *Gaved* v. *Martyn* (1865), 34 L. J. (N.S.) C. P. 353, at pp. 360, 361.
(*c*) *Ivimey* v. *Stocker* (1866), L. R. 1 Ch. App. 386.
(*d*) Conv. 22 Jac. 1, 12; 11 Car. 1, 5; 4 Inst. 231; 2 Roll. Rep. 44.
(*e*) Conv. 11 Car. 1, 5.
(*f*) 4 Inst. 230; Resolutions of the Judges, 16 Car. 1, c. 15, s. 6; *Att.-Gen.* v. *Lambe* (1848), 11 Beav. 213.

and working tinner, and that the cause of action arose within the Stannaries, or was concerning tin or tin works ; for the local courts had no jurisdiction in respect of any cause of action not concerning or arising in the Stannaries (*g*),—the Stannaries being defined as including all places,—*scil.*, within the two counties,—where some tin work was situate and in actual operation (*h*).

Stannaries court,—jurisdiction of :

(1) At common law ;

The Stannaries Court had both a common law and an equity jurisdiction ; and it was a court of record (*i*),—the jurisdiction being extended,—or declared to extend,—to all cases arising with respect to the working or carrying on of any mine of lead, copper, or other metal or metallic mineral, or the searching for, working, smelting or purifying any lead, copper, or other metal or metallic mineral, as fully as with respect to tin or tin mines ; and also, to non-metallic minerals found in the same mine and worked by the same adventurers ; and plumbago or black lead was declared to be a metallic mineral (*k*). The equity jurisdiction of the court was principally concerned with enforcing the calls and liabilities of partnerships in cost-book mines, both amongst each other and with respect to the public ; and with the winding-up of insolvent concerns (*l*) ; and apparently the county court had a concurrent jurisdiction with the Stannaries Court (*m*).

(2) In equity.

COST-BOOK COMPANIES,—JURISDICTION AS TO.

Stannaries court,—special jurisdiction as to cost-book mines :

(1) Generally ;

There are many special regulations regarding co-partnerships in tin bounds,—and for the due forfeiture of a partner's interest who fails to pay (or contribute) his due proportion of expenses (*n*) ; and every purchaser is required to give notice in writing of the name and residence of any person who purchases his share ; and all persons must give notice of the persons appointed to manage on their behalf (*o*). Co-partnership in tin mines in Cornwall and Devon are commonly described as cost-book mining companies,—and their mines are called cost-book mines ; and the mines of such co-partnerships may have been acquired from the tinners (in respect of their customary

(*g*) Cook, 467 ; Prohibition, 23, 293 ; Fleta, lib. 6, c. 7, 9 ; 4 Inst. 231.
(*h*) 16 Car. 1, c. 15 ; Pearce, 146.
(*i*) *Hall* v. *Vivian*, (1824), Smirke 37 ; *Vice* v. *Thomas* (1842), *ibid.* 1 ; 18 & 19 Vict. c. 32.
(*k*) 6 & 7 Will. 4, c. 106 ; 2 & 3 Vict. c. 58 ; 18 & 19 Vict. c. 32.
(*l*) *Vice* v. *Thomas*, *supra* ; 18 & 19 Vict. c. 32, ss. 4—10.
(*m*) *Newton* v. *Nancarrow* (1850), 19 L. J. Q. B. (N.S.) 314.
(*n*) 22 Jac. 1, 19 ; 11 Car. 1, 5, 16 ; 6 & 7 Will. 4, c. 106, s. 19
(*o*) 11 Car. 1, 5.

estates), or they may have been (and most usually are) acquired from the landowners.

(2) As to mortgages;

In the case of a cost-book mine within the jurisdiction of the Stannaries, all the mortgages and mortgage debentures of the company are to be registered at Truro, within twenty-eight days from their date,—and this registration is additional to any other registration required by law; and failing registration, the amounts comprised therein or charged thereby remain liable to creditors claiming for work and labour or for goods and materials supplied (*p*). Also, all the leases, grants, and licenses of any such company (or indeed of any one else), giving to the grantee or lessee the right to work mines within the Stannaries, and all assignments of such leases, grants, and licenses and all contracts for the sale thereof, are to be filed (that it is say, a true copy thereof is to be filed) at Truro, within fourteen days from the execution thereof,—and until so filed, are not enforceable either at law or in equity (*q*); and all the documents of such a company (which are of a nature to require registration with the registrar of joint stock companies) are also to be registered at Truro, as well as in London (*r*).

(3) As to leases, licenses, etc.;

(4) As to tribute tinners,—on receiving notice to quit;

Where, in a cost-book mine, a miner contracts to work a tin-stream at a fixed rate of tribute on the terms of providing and fitting up at his own expense the necessary plant and machinery, he is in every case entitled to one month's notice to quit; and he is entitled (on quitting) to the plant and machinery so provided by him, and also to all tin-stuff, dressed ore, and leavings that may be in or about his works; and he is to be allowed a reasonable time for removing the same (*s*).

(5) As to protection of water rights of tinners.

Where the tinners are entitled to an easement of water, whether in a natural stream or in an artificial stream of immemorial antiquity,—they can have an injunction against the wrongful diversion (or retention) of the water, whether the injury is committed or occasioned by the landowner over whose land portion of the watercourse runs, or by the lessees or licensees of such landowner (*t*).

STANNARIES COURT,—APPEALS FROM.

Stannaries court,—and county court

Appeals from the vice-warden originally lay to the lord warden, assisted by two or more assessors, being members of

(*p*) 50 & 51 Vict. c. 43, s. 19.
(*q*) *Ibid.*, s. 20.
(*r*) *Ibid.*, s. 31.
(*s*) *Ibid.*, s. 17.
(*t*) *Ivimey* v. *Stocker* (1866), L. R. 1 Ch. 396.

the judicial committee of her Majesty's Privy Council, or judges of the High Court of Chancery, or of the superior courts of common law; and there was an ultimate appeal to the House of Lords. But by s. 18 of the Judicature Act, 1873, the Court of Appeal established by that Act had transferred to and vested in it all the jurisdiction and powers of the court of the lord warden of the Stannaries, assisted by his assessors,—the ultimate appeal to the House of Lords remaining unaffected (*u*). And every appeal from the Stannaries jurisdiction of the county court for Cornwall still is, *semble*, to the Court of Appeal, the 59 & 60 Vict. c. 45 having made no change in this particular; but these appeals are, in fact, being heard in a divisional court of the High Court, equally as if they were ordinary appeals from county courts.

of Cornwall, —appeals from.

SECTION II.—*Lead Mines,—in Derbyshire.*

The lead mines of Derbyshire have been worked from the earliest period, and they still are worked, in accordance with certain local customs.

ORIGIN AND LOCALITIES OF THE CUSTOMS.

It would be difficult,—and unprofitable,—to trace with accuracy the origin and growth of these peculiar customs (*x*); but it is necessary to observe that the customs do not prevail throughout Derbyshire, but only in certain parts of Derbyshire, the principal places which are subject to the customs being—(1) The royal manors, called respectively (i.) the King's Field, or Fee, in the High Peak,—comprising the liberties of Castleton, Bradwell, Great and Little Hucklow, Winster, Taddington, Monyash, and Upper Haddon; and (ii.) the King's Field, or Fee, in the wapentake of Wirksworth, in the Low Peak; and (2) The private liberties of Ashford, Great and Little Longstone, Monsall-dale, Wardlow, Hassop, Calver, Rowland, Hartingdon, Peak Forest, Stoney-Middleton, Eyam, Tideswell, Litton, Youlgreave, and Crich. But it is to be remembered, that the manors of the High and Low Peaks are not co-extensive with the hundreds of the High and Low Peaks, so that in these

Customs,— (1) Origin of;

(2) Localities, where they prevail.

(*u*) 36 & 37 Vict. c. 66; 38 & 39 Vict. c. 77; 39 & 40 Vict. c. 59.

(*x*) Hardy's Miners' Guide, 1748; Mander's Glossary, 1824.

hundreds there are several manors which are not subject to the customs (*y*).

CUSTOMS,—ASCERTAINMENT OF, BY STATUTE.

Customs,—ascertainment of, by statute:

The customs in these various districts were variable; but those of the High and Low Peaks were formally inquired into in the sixteenth year of Edward the First, and were afterwards more accurately ascertained by inquisitions taken (before the mineral courts) in the seventeenth century; and a much greater uniformity, or certainty, has been introduced into the customs by the statutes 14 & 15 Vict., c. 94, and 15 & 16 Vict. c. 163, the former of these two Acts declaring the customs of

14 & 15 Vict. c. 94,—for High Peak;

that part of the hundred of the High Peak which comprises the liberties of Castleton, Bradwell, Hucklow, Winster, Monyash, Taddington, and Upper Haddon; and the latter of the two Acts declaring the customs within the soke and wapentake of Wirksworth in the Low Peak, and within the private manors of Ashford, Stoney-Middleton and Eyam, Hartingdon, Litton, Peak Forest, Tideswell, and Youlgreave in the High Peak, and of Crich in the Low Peak; and it is declared by both Acts, that the customs thereby declared shall supersede all other customs relating to the same districts. It will suffice therefore to give a concise account of the customs as thus declared, together with the few subsequent amendments thereof (*z*).

15 & 16 Vict. c. 163,—for Low Peak, etc.

CUSTOMARY MEERS,—WITH MINING RIGHTS.

Lead mines,—right (by the customs) to work and get.

The customs are confined to *lead* mines; and all the liege people of the nation may enter and search for lead ore in all lands and places within the liberties,—churches, burial grounds, dwelling houses, orchards, and gardens only excepted (*a*). And the finder or first discoverer of a vein is entitled to have assigned to him two meers of ground in it,—a meer being a space of ground which in a rake vein varies from twenty-seven yards to thirty-two yards in length, and in flat or pipe works is about fourteen square yards. The lord is then entitled to the next meer, which is usually resold to the miner at a valuation; and afterwards the finder (or, if he declines, any other person) is entitled to other meers as they are taken from the

Meers.

(*y*) *Beresford* v. *Bacon* (1685), Lutw. 418; *Lynn Regis* v. *Taylor* (1684), 3 Lev. 160.

(*z*) *Wake* v. *Hall* (1880), 7 Q. B. D. 295; 8 App. Cas. 195.

(*a*) *Gilbert* v. *Tomison* (1824), 4 D. & R. 222.

lord, and freed,—the lord being entitled to only one meer for the whole vein; and freeing consists in delivering the first dish of ore to the lord,—a ceremony equivalent to livery of seisin; and without such livery, there can be no title to the mine. Every miner is entitled also to all necessary rights of way, and to the liberty of heap-room, or (as it is called) of *quarter cord*,—being the right to use, without any payment therefor, a piece of ground extending along the sides of the vein, and set out for enabling the miner to place and wash the ore, and heap the refuse. And in the Low Peak, this piece of ground used to be a quarter of a meer in breadth; but from what point this quarter meer was to be measured, whether from the middle of the vein or from the nearest side of the vein, was often a subject of dispute,—the latter mode having been admitted to be correct in the case of Sir Henry Harpur, in a trial at Derby, on March 22nd, 1753; and now the barmaster and two of the grand jury are to lay out a sufficient space. And apparently also, the miner may, under the customs as declared by the statutes,—although he could not under the old customs (*b*),—erect and use all modern appliances for working the lead (*c*).

Mining rights.

Once a meer is freed, the mine is declared to be an estate of inheritance (*d*); and in support of his estate of inheritance, the miner must maintain and keep each meer in his possession, by the erection of stowses, and otherwise,—the stowses being wooden apparatus actually employed in winning or working the ore; but latterly, "sham stowses," or diminutive pieces of wood fixed in the ground and suspended "in all men's sight," were permitted to suffice; and the erection and maintenance of these stowses continued necessary, even after the working stowses had been superseded by the erection of powerful engines; for if the stowses were destroyed or not kept in good repair, or not replaced by others, the meer of ground was forfeited,—that is to say, was liable to be forfeited.

Meers, being freed and duly maintained, —were estates of inheritance.

MEERS,—FORFEITURE AND ABANDONMENT OF.

It was also necessary, of course, that the mine should continue to be fairly worked; and if it remained unworked

Meers,—forfeiture of, for non-working.

(*b*) *Harpur* v. *Governor and Company for Smelting Lead*, Derby Assizes, March 22nd, 1753.

(*c*) *Wake* v. *Hall* (1880), 7 Q. B. D. 295; 8 App. Cas. 195.

(*d*) *Doe* d. *Thompson* v. *Pearce*, (1812), Peake's Add. Cas. 242.

for a few weeks together, the barmaster was required to "nick the spindle" once a week for three weeks, and the mine, if it still remained unworked, was forfeited,—that is to say, was liable to be forfeited after the last nick, and might then be disposed of to others,—the spindle having been a small piece of wood belonging to the stowses, fixed in the ground to mark the boundary of the meer; and nicking it meant notching it,—a ceremony, which was equivalent to entry for breach of condition, and it was often resorted to for effectually determining former claims. But the customs, as now declared by the statutes already mentioned, have dispensed with that ceremony, and have provided otherwise for the declaration of forfeiture, in case the mines remain unworked, without any such process; and, in fact, in the districts to which these statutes are applicable, all stowses, real or fictitious, have been abandoned.

Meer,—abandonment of.

When the mine is abandoned, it reverts (with all the materials therein) to the owner of the soil (whether lord or crown) (*e*),—but subject to the miners' right of removing the materials and fixtures (*f*).

DUTIES OF LOT AND COPE.

Meers,—duties payable in respect of ore raised;

The duties payable in respect of the lead ore raised in the manors of the High Peak and Low Peak belong to the crown in right of the duchy of Lancaster, and are usually farmed out to influential owners in the vicinity; while the duties in the other customary manors belong to the lords of those manors or their grantees. It was formerly contended, that the inferior kind of ores, called *smitham* and *forested ore*, were not liable to duty at all; but it has been decided otherwise by two successive actions at law—the first in 1750, against the miners of the High Peak; and the other in 1773, against the miners of the Low Peak.

i.e., *Lot* and *cope*.

The amount of the duty, that is to say, "*lot*," is usually one-thirteenth part of the ore raised; and the lord is also entitled to "*cope*," being sixpence or fourpence for every load of ore carried off from the ground, and the load being nine dishes, and the contents of a dish varying from fourteen to sixteen pints. The celebrated brazen standard dish of Wirksworth, in the Low Peak, contains almost precisely fourteen pints; but in the High Peak

(*e*) *Lee* v. *Shore*, Derby Summer Assizes, 1822.

(*f*) *Wake* v. *Hall* (1880), 7 Q. B. D. 295; 8 App. Cas. 195.

Act, fifteen pints go to the dish; and the ores are not to be removed before measurement (*g*).

BARMASTER, AND BARMOTE COURTS.

Barmaster,—appointment and duties of.

The Barmaster [Berg-master] is an officer who was formerly appointed by the miners and merchants, but who is now appointed by the lords or by their farmers of the duties; and he has important functions to perform towards all those interested in the mines. That is to say, he is required to ascertain and lay out the meers on every occasion, and to mark out rights of way to the highway, and rights of water for washing the ore;—to visit and examine the meers regularly for the purpose of discovering any causes of forfeiture;—to measure out the ore actually raised;—to secure the render of lot and cope;—to enter into all mines;—to arrange for the settlement of all disputes;—to execute the warrants of the steward; to sell the lord's meers; and to hold courts, summon juries, and present offences; and generally to observe and enforce the customs. And note, that the lord or the crown-lessee cannot, because of the conflict between his interest and his duty, hold the office of Barmaster (*h*).

Barmaster's book,—entries in, and title by.

Interests in the mine are transferred by entry in the barmaster's book; and every document entered in the book is entitled to priority over later entries; and the title dates from the entry,—*scil.*, the date of the barmaster's gift,—and not from any precedence in actual working.

Barmote courts,—jurisdiction of.

Actions of title or trespass, or of debt for mining articles, or for work or labour, may be brought in the small barmote court; and any partner refusing to work or to contribute his proportion of the working expenses for twenty-one days, forfeits his share, which can be summarily recovered in the small barmote court. When any mine is freed from water by the operations of other miners, they may claim a portion of the ores afterwards raised from the mine so relieved; and the due proportion is to be settled by the barmaster and a grand jury (*i*). Two or more contiguous mines may be consolidated with the consent of the barmaster and grand jury, and the mines thereafter worked as one mine. The jurisdiction is concurrent with that of the High Court of Justice; but a writ of *certiorari* may be issued to the barmote court.

(*g*) *Att.-Gen.* v. *Wall* (1760), 4 Bro. P. C. 665.
(*h*) *Arkwright* v. *Cantrell* (1837), 7 Ad. & E. 565.
(*i*) *Arkwright* v. *Gell* (1839), 5 Mee. & W. 203.

Barmote courts,—times for holding.

The great barmote courts of the manors are generally held twice in every year, in April and October; but the small barmote courts in which all disputes and differences arising in the working of the mines are decided, are held as occasion may require (*k*).

Barmaster,—is plaintiff, on behalf of the lead miners, *semble*.

In *Arkwright* v. *Cantrell* (*l*), the defendant had been found guilty by a barmote jury of injuring the shaft of one J. B.; and under the custom in that behalf applicable, he had been fined 10*l*., —one half of which sum was payable to the plaintiff as barmaster; and the defendant having refused to pay the 5*l*., the plaintiff sued him for it. And it being necessary for the plaintiff to prove that he was barmaster, he put in a royal grant under the seal of the duchy of Lancaster, dated 1827; but it appearing by such grant that the plaintiff was crown-lessee of the lead mines (and as such entitled to the lot and cope) as well as grantee of the barmastership with its emoluments, the defendant at once took the objection, that the plaintiff's appointment as barmaster was illegal and void as making him a judge in matters affecting his own interest as crown-lessee of the lead mines; and that objection prevailed,—the court considering that the plaintiff as crown-lessee had interests which were incompatible with his execution (even by deputy) of the office of barmaster.

Barmote jury, findings of,—effect of.

In *Sybray* v. *White* (*m*), there was a disused shaft in a field of the plaintiff's; and the plaintiff's horse lawfully depasturing in such field fell down the shaft, the mouth of which was insecurely covered over; and the plaintiff sued the defendant as owner of the shaft for the loss of the horse. The defendant (it appeared) was a lead-miner, working according to the Derbyshire customs, and the shaft had been lawfully made or opened under such customs; and the plaintiff was required to shew that the shaft belonged to defendant's mine. And by agreement between the plaintiff and the defendant, the question of the defendant's ownership of the shaft was submitted to a jury of the barmote court, the defendant offering to abide by the finding of such jury; and the barmote jury found that the shaft belonged to the defendant's mine. But notwithstanding that finding, the defendant still refused to pay for the loss of the horse, and the plaintiff sued him in this action, and obtained a verdict, the finding of the jury being largely (but not entirely) based upon

(*k*) *Sybray* v. *White* (1836), 1 Mee. & W. 435; *Wake* v. *Hall* (1880), 7 Q. B. D. 295; 8 App. Cas. 195.

(*l*) (1837), 7 Ad. & E. 565.

(*m*) (1836), 1 Mee. & W. 435.

the finding of the barmote jury as to the defendant's ownership of the shaft, which last-mentioned finding was treated as in the nature of an admission by the defendant through the barmote jury as his accredited agents.

CUSTOMARY ESTATES OF MINERS, AND PRIVATE LANDOWNERS' ESTATES,—RELATION OF.

Landowner and lead-miner,—relation of, *inter se.*

In *Wake* v. *Hall* (*n*), where the plaintiff was a landowner, and the defendant a lead-miner,—and the defendant had, by virtue of the customs in that behalf, appropriated land of the plaintiff, and erected thereon an engine with an engine-house and other fixtures and buildings ; and the plaintiff sued the defendant for the damage sustained to his land by the defendant's taking down the engine-house and other buildings, and removing the engine and fixtures. The court said, that the defendant had lawfully erected the buildings, and was entitled to take them down and to carry away the materials,—it appearing that his title as a miner still continued, not having been forfeited for the discontinuance to work the lead mine ; and the court also said, that the miner's position was analogous to that of a fee simple owner of subjacent mines who had all the necessary rights over the surface for the working and getting and carrying away of the lead mines,—and there was no such privity between him and the surface owner as enters into the relation of landlord and tenant, or the relation of heir and executor.

Customary rights,—paramount the rights of the private landowner ;

In all those parts of Derbyshire to which the customs do not extend, the ordinary law will, of course, be applicable,—therefore in these places the mines will be worked under the usual mining leases or mining licenses, to be granted by the mine-owners, whoever these may be, whether crown or crown-grantee or private landowner (*o*) ; but in all those parts of Derbyshire where the customs prevail, the title under the customs is paramount to the title of the landowner (*p*) ; and the miners are (in effect) *licensees* of the crown,—the crown (in right of the duchy of Lancaster) being owner of the manorial lead mines (*q*).

and on cesser of the customary rights, the

In *Devonshire* (*Duke*) v. *Stokes* (*r*), in which the question was, who was the owner of a certain unfenced abandoned mine, the court said, that the duke as lord of the manor was the owner,

(*n*) (1880), 7 Q. B. D. 295 ; 8 App. Cas. 195.
(*o*) *Wright* v. *Pitt* (1870), L. R. 12 Eq. 408.
(*p*) *Wake* v. *Hall* (1880), 7 Q. B. D. 295 ; 8 App. Cas. 195.
(*q*) *Ibid.*
(*r*) (1897), 13 T. L. R. 376.

although holding subject (as regards the lead in the mine) to the customs of the district,—for that these customs merely gave the miners the privilege of working the vein of lead ore, and did not confer upon them any ownership in the soil of the mine ; and when the mine was abandoned as a lead mine, the owner of the fee simple of the land in which it was situated became again the owner of the mine,—according to the general law.

private ownership is intact.

SECTION III.—*Mines generally,—in the Forest of Dean and Hundred of St. Briavel's (Gloucestershire).*

Free miners, —definition of, and customary rights of.

All male persons born and abiding within the hundred who are of the age of twenty-one years, and who have worked for a year and a day in a coal or iron mine within the hundred (being the free miners of the hundred) are entitled to open mines and quarries in the unenclosed lands of the Forest and to open mines in all the lands within the hundred (except churchyards, etc.) ; and certain other persons (also called free miners) born and abiding within the hundred who are of the age of twenty-one years and who have worked for a year and a day in a stone quarry within the forest are entitled to open stone quarries within the unenclosed lands of the forest.

CUSTOMS,—ORIGIN AND REGULATION OF.

Customs,— origin of.

The rights of the free miners depended originally upon (and had their origin in) certain customs or usages of immemorial antiquity ; and considerable uncertainty having latterly attached to them, they were declared and amended (and also regulated) by the 1 & 2 Vict. c. 43. And by the regulations contained in that Act, or which have been made under its provisions, it is required, — That the free miners shall be registered by the gaveller of the forest (ss. 16, 20), and no one who is not so registered is a free miner (s. 21) ; and it is enacted (by s. 23), that the free miners shall have the exclusive right of having gales or works granted to them by the crown-gaveller, —to open mines within the hundred, and to have gales or leases of quarries within the forest, with full rights to assign or transfer such gales. And provision is made (by ss. 38 —40) for the recognition of existing gales, and for the confirmation of all past assignments or transfers thereof ; and (by s. 29) for the regulation of the future working of all gales,

Customs,— ascertainment and regulation of.

subject to a liability to forfeiture for the neglect to work same ; and (by ss. 41—44) for the fixing of the "galeage rents, royalties, tonnage duties, and other payments to be paid or made to the crown," in respect of coal mines and other minerals.

(1) As to gales, grants of, and enrolment of.

And (by s. 56) it is provided, that every grant of a gale shall define the metes and bounds or limits and extent of the gale, and also the galeage rent or royalty or other rent payable, and shall be worked according to such of the rules and regulations aforesaid as are in that behalf applicable ; and (by s. 57) the grant is to be entered in the gaveller's book, and to be enrolled in the office of Land Revenue Records and Enrolments ; and (by s. 58) all assignments of the gale are to be also entered in the gaveller's book. The gales are (by s. 60) to be granted in the order of application therefor by the free miners ; but (by s. 61) no free miner is to have more than three gales granted to him at any one time ; and (by s. 62) no new gale is to be granted which shall interfere with an existing gale. And it is also provided (by s. 83), that her Majesty's commissioner of woods may grant to the free miners leases of quarries in the forest, for any term not exceeding twenty-one years ; and (by s. 84) that these commissioners may grant licenses to dig and get clay or sand in any of the unenclosed lands of the forest, at such rents and royalties (payable to the crown) and subject to such conditions as the commissioners may think fit, every such lease being required to contain a proviso for re-entry ; and the lease is to be entered in the books of the commissioners, and also to be enrolled in the office of Land Revenue Records and Enrolments.

(2) As to leases of quarries.

(3) As to licenses to dig and get clay and sand.

Galee, interest of,—an estate of inheritance, *quodammodo*.

By the 24 & 25 Vict. c. 40, s. 1, the estate or interest of the galee under the gale-grant is declared to be real estate in the nature of an estate of inheritance, subject only to the payment of the galeage rent or royalty, and to the observance of the rules and regulations applicable thereto (*s*).

Mining easements,—grant of.

By the 24 & 25 Vict. c. 40, s. 6, amending s. 26 of the 1 & 2 Vict. c. 43) leases of portions of the unenclosed lands of the forest for mining purposes (including smelting purposes) or for quarrying purposes, may be granted to the galees or quarry-lessees ; and (by s. 15, amending s. 65 of the 1 & 2 Vict. c. 43) mining easements may be granted for, the construction of air-shafts and roadways in or over the inclosed lands of the crown, and for the sinking of pits and shafts therein,—subject to the

(*s*) *Morgan* v. *Crawshay* (1869), L. R. 4 Q. B. 581 ; L. R. 5 H. L. 304.

payment of compensation for the use of the lands occupied with such air-shafts and roads or pits and shafts, and subject to the grantee restoring the surface on the disuse thereof. But (by s. 69 of the 1 & 2 Vict. c. 43) in the case of inclosed lands within the hundred, the consent of the private owner thereof is also required to be obtained to the construction of any such works and mining conveniences ; and (by s. 67 of the 1 & 2 Vict. c. 43) the moiety of the galeage rent or royalty in respect of all mines gotten from inclosed lands within the hundred is to be paid to the private owner of the inclosed lands.

Gale,—surrender of.

By the 34 & 35 Vict. c. 85, s. 33, amending and extending the provisions contained in the 24 & 25 Vict. c. 40, ss. 19—21, provision is made for the surrender of any gale or part of a gale ; and (by s. 34) provision is made for granting to the free miner (or to his assignee) a new lease upon the surrender or determination of any existing quarry lease.

THE AWARDS,—MADE UNDER THE ACTS.

The three awards,—(1) As to coal mines ; (2) As to tin-mines ; and (3) As to quarries,—

Under the principal Act (1 & 2 Vict. c. 43) three several awards, dated respectively March 8th, 1841, July 20th, 1841, and July 24th, 1841, were made by the commissioners in that behalf appointed by the Act,—the first of such awards relating to coal mines, the second of them relating to tin mines, and the third of them relating to quarries ; and in each of these awards were contained (among other things) the rules and regulations by which all gales and leases were thereafter to be regulated ; and by virtue of s. 31 of the principal Act, these rules and regulations, aiding and supplementing the provisions contained in the Acts themselves, have superseded the old customs and usages relative to the rights of the free miners. But the rules and regulations were themselves made subject to amendment ; and they have been, in fact, amended (as to some of them) by the 24 & 25 Vict. c. 40, and (as to others of them) by the 34 & 45 Vict. c. 85, and generally by the subsequent award made under the provisions of the last-mentioned Act. And the 1 & 2 Vict. c. 43 (modified only as modified by the later Acts) is to be regarded as having abrogated all the old customs as to mines within the forest and hundred, and as having conferred new (analogous) rights upon the free miners (*t*).

as amended,—now regulate the rights of the free-miners.

(*t*) *Goold* v. *Great Western Deep Coal Co.* (1865), 12 L. T. (N.S.) 842.

GALES, APPLICATIONS FOR; AND GRANTS AND SURRENDERS OF.

Gale unworkable to a profit,—surrender of.

Where a free miner has had three gales granted to him, and he afterwards finds that one of such gales is unworkable to a profit, he may surrender that gale,—and provided his surrender is accepted by the gaveller, he may have a new gale granted in lieu of it; for a gale is to be deemed an "*exhausted*" gale, when there is not (and it is found that there is not) enough mineral in it to make it worth working (*u*).

Gales, grant of,—applications for.

Where a free miner entitled to the grant of a gale makes due application therefor, but dies before the grant is made to him,—his devisees (not being themselves free miners) are not entitled to have the grant made to themselves (*x*).

A free miner who has applied for a grant may afterwards, and at any time before the grant is actually made to him, withdraw his application (*y*).

Gales, grant of,—when title under complete.

The mere application for a gale does not give the applicant any estate or interest, legal or equitable, in the property to be comprised in the gale; and such applicant has no right whatever to touch the property till the gale is granted to him; and, in fact, no right is acquired before the actual sealing of the grant by which the crown creates the estate (*z*).

Grant of gales,—by crown only; or, *semble*, by crown-grantees.

The right of granting gales is exclusively in the crown, and cannot be exercised by the lords of manors situate within the forest; and any purported grants by such lords would be deemed mere acts of usurpation conferring no right or title by adverse possession (*a*). But, *semble*, any crown-grantees of parcels of the unenclosed lands of the forest, or of the minerals of the crown within the forest or within the hundred, might be entitled to grant such gales,—or to grant leases of the stone quarries,—and also to take to their own use the gale rents and other rents reserved on such gales and leases (*b*),—at least, where the crown grants are of a date subsequent to the 1 & 2 Vict. c. 43, and not if they are of a date prior to that Act.

(*u*) *Ellway* v. *Davis* (1873), L. R. 16 Eq. 294; *James* v. *The Queen* (1877), 5 Ch. D. 153.
(*x*) *James* v. *The Queen*, *supra*.
(*y*) *Ibid.*
(*z*) *Ibid.*
(*a*) *Att.-Gen.* v. *Mathias* (1858), 4 K. & J. 579.
(*b*) *Ibid.*

GALES, ASSIGNMENTS OF; ALSO FORFEITURES OF.

Gales,—grants and assignments of.

No one who is not a free miner is entitled to,—or, in fact, competent to accept,—a gale (*c*); but persons who are not free miners may put forward a free miner to accept a gale on their behalf, and as a trustee for them (*d*). And, of course, the original grantee of a gale may assign the gale to one who is not a free miner, or to a company; and where a gale has been granted to A. (a free miner), and A. has assigned the gale to two persons as joint tenants, the gale will survive into the survivor of the two joint tenants, and he may alienate it.

Gale, forfeiture of,—for non-payment of galeage rent.

The grant of a gale is always subject to the condition (express or implied), that the grantee shall duly pay his galeage rent or royalty (*e*),—and for non-payment thereof, the crown may re-enter as for a forfeiture,—and may so re-enter, doing so peaceably and not forcibly, without any proceedings in ejectment; and if relief against the forfeiture can be obtained at all, the application for relief must be made within six months after the re-entry of the crown (*f*).

Dead rent,—reservation of.

A dead rent or minimum rent may be lawfully reserved in the grant of a gale,—and such rent will be payable (during the subsistence of the grant), whether the mineral comprised in the gale is worked or not (*g*).

Arrears of rent,—recovery of.

Rents in arrear may be recovered by the gaveller by action in the county court of the district (*h*); and he may also refuse to register the transfer of a gale until all arrears of rent are paid (*i*),—but not, *semble*, arrears due from a former galee of the same mine (*k*).

SUBJACENT GALES,—RIGHTS AS BETWEEN.

Sinking shaft through upper seam to lower seam,—right of.

In *Goold* v. *Great Western Deep Coal Co.* (*l*), where the plaintiffs were galees of certain upper seams, and the defendants were galees of the lower seams lying thereunder; and the defendants were sinking a pit from the surface through the

(*c*) *Att.-Gen.* v. *Mathias* (1858), 4 K. & J. 579.
(*d*) *Holmes* v. *Williams*, W. N. (1895) 116.
(*e*) *In re Brain* (1874), L. R. 18 Eq. 389.
(*f*) *Ibid.*
(*g*) *Seymour* v. *Morrell* (1851), 17 L. T. (O.S.) 139.
(*h*) 24 & 25 Vict. c. 40, s. 5.
(*i*) *Ibid.*, s. 9.
(*k*) *Att.-Gen.* v. *Jackson* (1846), 5 Ha. 355.
(*l*) (1865), 11 Jur. (N.S.) 865; 2 De G. J. & S. 600; 12 L. T. (N.S.) 842.

plaintiff's seams down to their (the defendants') own seam,—the court held, that the defendants were entitled to do so, the condition which (by the 1 & 2 Vict. c. 43, and the award of 1841 made thereunder) was attached to the grant of the lower seams,—to the effect that these latter should be so worked as not to impede or injure the workings of the upper seams,—referring only to the working, and not to the preliminary winning, of the lower seams,—and, therefore, not applying at all to the mere sinking of the pit, which was preliminary to the working,—and the right to sink was an implied right, that being the only mode of gaining access to the lower seams.

Trespasses to gales,—damages recoverable for; and measure of.

As between adjoining galees, where either overpasses the boundary and works the mineral of the other's gale, the latter may have trespass against him and recover damages in respect of the mineral so wrongfully gotten (*m*),—and this remedy is available, whether the trespass is wilful, or whether (the boundary being difficult to ascertain or being disputed) the trespass is purely inadvertent (*n*). But the measure of the damages would vary, according as the trespass was fraudulent or inadvertent,—just as it would vary in the case of trespasses to barriers in mines generally,—that is to say, the damage would be (roughly) five times greater where the trespass was fraudulent, than where the trespass was merely inadvertent (*o*).

Lower gale,—protection of, by upper gale, from inroad of water.

As between adjoining galees, the higher gale (or land gale) is under a duty towards the lower gale (or dip gale) to prevent the water accumulating in the higher gale from passing down into the dip gale,—which duty may be enforced by injunction (*p*); and for any past damage sustained by the lower gale from the interim neglect of this duty, damages are recoverable by ordinary action (*q*). And these are the remedies available as between the galees themselves; but as regards the crown, the remedy would be by forfeiture of the gale of the offender, or (in a proper case) by information at the suit of the Attorney-General for an injunction to enforce the duty (*r*).

(*m*) *Brain* v. *Harris* (1855), 10 Exch. 908.
(*n*) *Ibid.*
(*o*) See *Martin* v. *Porter* (1839), 5 Mee. & W. 352; *Llynvi Co.* v. *Brogden* (1870), L. R. 11 Eq. 188; *Wood* v. *Morewood* (1841), 3 Q. B. 440 n; and *Hilton* v. *Woods* (1867), L. R. 4 Eq. 432.
(*p*) 1 & 2 Vict. c. 43, s. 29; *Great Western Collieries Co.* v. *Trafalgar Co.* (1887), 3 T. L. R. 724.
(*q*) *Rosse* v. *Rugge-Price* (1875), 1 Ex. D. 269.
(*r*) *Brain* v. *Thomas* (1880), 50 L. J. Q. B. 662.

GALE,—PRIOR TITLE TO.

Gale, priority of application for,—gives priority of title.

As between the several applicants for gales, the first in order of time is to be preferred (*s*); but, for this purpose, the application must have been made after a gale is free or vacant (*t*), and not before it is (or is in prospect of becoming) free or vacant (*u*).

As between two successive purchasers of the same gale from the galee thereof, the first in date of the purchase agreements will ordinarily prevail,—at least, where the second purchaser has notice of the first purchase agreement,—and that is the general law; but the first purchaser may, by his conduct, have lost his right of priority,—as, *e.g.*, by his long neglect to enforce completion or to do any other act in maintenance of his agreement (*x*).

FORFEITED GALE,—RECOVERY OF.

Gale, on crown's forfeiture thereof,—no ejectment necessary for recovery of possession.

As between the crown and the grantee of a gale, the crown may forfeit the gale for neglect to work the minerals comprised therein; and the forfeiture is effected without any proceedings in ejectment, and merely by notice to the galee given on behalf of the crown followed up by an order given to the officer of the crown to take possession,—the forfeiture being complete upon such notice and order, and before the actual taking of possession (*y*).

It is not compulsory, of course, on the crown to proceed to a forfeiture of the gale, even where a cause of forfeiture has arisen; and there is, therefore, no forfeiture until the crown has proceeded to declare the forfeiture (*z*).

REGISTER OF FREE MINERS.

Register of free miners,—rectification of.

Where a person pretends to be a free miner, and the crown disputes his title to be a free miner, the remedy is by information in the nature of a *quo warranto* (*a*); but the production of the register of free miners is conclusive, either for or against the claim to be a free miner; and if the claimant is not entered on that register, and the omission to enter his name is wrongful,

(*s*) *James* v. *The Queen* (1877), 5 Ch. D. 153.
(*t*) *Ibid.* (1874), L. R. 17 Eq. 509.
(*u*) *James* v. *Young* (1884), 27 Ch. D. 652, citing *Ex parte Young and Grindell* (1880), 50 L. J. Ch. 221.
(*x*) *Alloway* v. *Braine* (1859), 26 Beav. 575.
(*y*) *Ex parte Young and Grindell* (1880), 50 L. J. Ch. 221; *James* v. *Young* (1884), 27 Ch. D. 652.
(*z*) *Ibid.*
(*a*) *The Queen* v. *Harris* (1840), 11 A. & E. 518.

he should obtain (by *mandamus* or otherwise) a rectification of the register.

SUBSIDENCE BY GALEE'S WORKINGS.

Subsidence of surface,—galee may not occasion.

As between the surface owner and the grantee of a gale, the galee must not so work the minerals as to cause a subsidence of the surface or of the buildings thereon (*b*),—the compensation provided by the 1 & 2 Vict. c. 43, for surface damage being for damage occasioned otherwise than by subsidence (*c*); and an injunction may, therefore, be obtained against the galee (or other the person or persons working under him) to prevent a subsidence; and in all these respects, the law applicable to galees is the ordinary law applicable to miners generally.

(*b*) *Allaway* v. *Wagstaff* (1859), 4 H. & N. 307, 681; 70 L. J. Exch. 51.

(*c*) *Ibid.*

CHAPTER VIII.

ON PRESCRIPTION AND CUSTOM:

AND ON THE MINING RIGHTS ACQUIRED THEREBY RESPECTIVELY.

Adverse possession and prescription,—distinguished.

CORPOREAL hereditaments, where they are not acquired by deed or will or otherwise, consistently with the pre-existing title, may be acquired by adverse possession, but not by prescription or custom (*a*); and incorporeal hereditaments, on the other hand (such, *e.g.*, as easements and the like), are acquired by prescription, and some are acquired by custom,—*scil.*, where they are not acquired by express deed of grant or otherwise under the pre-existing title.

Mines,—are corporeal hereditaments, and subject to adverse possession.

And for the purposes of this distinction between adverse possession and prescription, mines are corporeal hereditaments, although the liberty of getting them (or a license to get them) is an incorporeal hereditament,—and the old opinion that unopened mines were incorporeal hereditaments (*b*) is an exploded opinion (*c*). Consequently, a title to mines, where it is not conferred by deed, or by other voluntary conveyance, but is acquired adversely to the true owner, is to be claimed under the Real Property Limitation Acts (*d*) and not under the Prescription Act (*e*).

Title by prescription, and title by adverse possession,—as against incapacitated owners.

A title by prescription to incorporeal hereditaments and a title by adverse possession to corporeal hereditaments are wholly different things in law; thus, for example, where the title claimed by prescription could not have had a legal origin, that is to say, could not have arisen by voluntary grant, the title will be bad (*f*); and yet in such a case the title by adverse possession will be good,—that is to say, where a public company cannot by voluntary grant alienate its lands, yet the adverse possession of these lands by A. for twelve years will confer a

(*a*) Roll. Abr. Prescription (B.).
(*b*) 1 Shep. Touch. 96.
(*c*) *Wilkinson* v. *Proud* (1843), 12 Mee. & W. 33.
(*d*) 3 & 4 Will. 4, c. 27; 37 & 38 Vict. c. 57.
(*e*) 2 & 3 Will. 4, c. 71.
(*f*) *Mill* v. *New Forest Commissioners* (1856), 18 C. B. 60.

fee simple title on A. (*g*),—except, of course, in the case of an entail, which is (by special statute) indestructible (*h*).

Transfer of title by adverse possession,—true nature and effect of.

The effect of adverse possession is, by force of the Statutes of Limitation, to extinguish the title of the former rightful possessor (*i*), — and to confer a new title (that is to say, a parliamentary title) on the adverse possessor (*k*),—which new title, in respect that it is a *new* title, will not be subject to the charges and incumbrances which affected the old title (*l*). And where the property adversely acquired is a leasehold, the effect of the adverse possession is to extinguish the lessee's title, and to give to the adverse possessor a title for the residue of the term, but not to transfer into (or to vest in) the adverse possessor the estate or title created by the lease—consequently, such adverse possessor is not, on the expiration of the term, liable to the lessor on the lessee's covenant to deliver up the premises in repair (*m*) ; but, *semble*, the lessor might (during the term) proceed to recover the possession for breach of any covenant in the lease, and so might summarily defeat the right or interest of the adverse possessor.

Dormant mining lease,—commencement of workings under, thirty years after date of lease, title being saved.

In *Keyse* v. *Powell* (*n*), the plaintiff was the owner in possession of certain surface lands and of the mines thereunder, and he sued the defendant for trespassing upon the lands and digging and carrying away the mines ; and the defendant justified under a lease of the mines for ninety-nine years, granted to two lessees by a predecessor in title of the plaintiff, and which lease (after divers mesne assignments) had become and then was vested in the defendant ; and the plaintiff replied, that the lease had been granted in 1821, and (no entry thereunder having ever been made) the right of the defendant to enter and dig was barred by the Statutes of Limitation,—over thirty years having elapsed since the date of the lease. But it appearing that one of the two original lessees had been in possession at the date of the grant of the mining lease (1821), as tenant from year to year of the lands (although not specifically of the mines also), the court said, that his possession as such yearly tenant was a possession of the soil and mines throughout, and enabled him

(*g*) *Bobbett* v. *South Eastern Rail. Co.* (1882), 9 Q. B. D. 424 ; *Brighton (Corporation)* v. *Brighton (Guardians)* (1880), 5 C. P. D. 368.

(*h*) *Abergavenny (Earl)* v. *Bruce* (1872), L. R. 7 Ex. 145.

(*i*) *Incorporated Society* v. *Richards* (1841), 1 Dr. & W. 258.

(*k*) *Doe* d. *Jukes* v. *Sumner* (1845), 14 Mee. & W. 39.

(*l*) 1 Dart's V. & P., 6th ed., p. 463.

(*m*) *Tichborne* v. *Weir* (1893), 67 L. T. 735.

(*n*) (1853), 2 El. & Bl. 132 ; 22 L. J. Q. B. 305.

to accept (without further entry) the mining lease, equally as if that lease was a release to the yearly tenant,—and such possession enured as possession under the mining lease, and for the benefit of his co-lessee as well as of himself. Consequently, as the term of ninety-nine years was still subsisting, the defendant, or his predecessors in title, had never been out of possession of the mines, although they (or any of them) had never, until the date of the defendant's alleged trespass, worked the mines; and the defendant's justification of the alleged trespass was valid, and the reply of the Statutes of Limitation was bad.

PRESCRIPTION, AT THE COMMON LAW, AND UNDER THE ACT OF 1832.

Prescription, —either at the common law, or under the Act of 1832.

The title to an easement by prescription may be either by prescription at the common law, or by prescription under the Prescription Act, 1832 (*o*). And for a title to arise by prescription at the common law, it was necessary that the enjoyment should have been long, peaceable, open, and "as of right,"—*longus usus, nec vi, nec clam, nec precario* (*p*). And in measuring the length of time required to give the prescriptive right, reference was naturally made to the memory of man, or to "*time whereof the memory of man runneth not to the contrary*,"—which, in legal significance, meant the 1 Rich. 1, being the year 1189. But inasmuch as that requirement far outstretched any living evidence, recourse was had to the fiction of a lost modern grant (*q*); and the judge would direct the jury in certain cases, or under certain circumstances, to find such grant; and if his direction to that effect was disregarded, a new trial could be obtained as of right (*r*); and so it became established in practice, that the right could not be defeated by giving proof merely of its non-existence at some prior period, however short, before the time when the lost grant was to be presumed (*s*). And the chief object of the Prescription Act, 1832 (*t*) was to dispense altogether with the intervention of a jury in such a case, and to make the finding of the lost grant a rule of law (*u*); but otherwise the provisions of that Act have not superseded the provisions of the common law,—so that the

(*o*) 2 & 3 Will. 4, c. 71.
(*p*) Co. Litt. 113 b.
(*q*) Inst. lib. 2, t. 3.
(*r*) *Jenkins* v. *Harvey* (1835), 1 Cr. M. & R. 894.
(*s*) *Campbell* v. *Wilson* (1803), 3 East, 294; *Doe* d. *Fenwick* v. *Reed* (1821), 5 B. & A. 232.
(*t*) 2 & 3 Will. 4, c. 71.
(*u*) *Bright* v. *Walker* (1834), 1 Cr. M. & R. 217.

title to the liberty or easement may still be made either under the Act or as before the Act was passed (*x*). It is necessary, therefore, to consider, firstly, prescription at the common law (including therein Prescription under the presumed grant, or by lost grant) ; and, secondly, Prescription under the Act.

(i.) Prescription at the common law.

(1) Prescription at the common law.

And, Firstly, as regards prescription at the common law : That was of two varieties, namely (1) Prescription *in a que estate* ; and (2) Prescription in *a man and his ancestors* (*y*). And regarding each of these varieties of prescription at the common law, these two points were, and are, settled, namely,—

(*a*) Length of enjoyment required,—twenty years or less.

(1) That although the prescription was only good, if it had been of immemorial antiquity,—going back, that is to say, to the year 1 Rich. 1,—still it was a settled rule regulating this proof, that it was enough to prove undisturbed enjoyment, as far back as living witnesses could speak,—which proof raised the presumption of an immemorial enjoyment (*z*) ; and undisturbed enjoyment for twenty years even,—or for less,—would have sufficed (*a*),—*scil.*, in the absence of other evidence to the contrary ; and note, that this rule as to the proof of a prescription applied also to the proof of a custom (*b*).

(*b*) Non-existence in fact, or impossibility of existence within legal memory,—fatal.

(2) That the title by prescription might be defeated by proof that the right claimed did not, in fact, exist,—or (for any legal reasons) could not exist,—at some point of time within the period of legal memory ; and inasmuch as every title by prescription implies a grant,—nothing was claimable by prescription which could not be the subject-matter of a grant (*c*),—so that it became usual to designate a title by prescription as a title by lost grant (*d*) ; and, therefore, where no grant was possible, no title by prescription arose ; but note, that this rule did not apply to proving a customary right (*e*).

(*x*) *Onley* v. *Gardiner* (1838), 4 Mee. & W. 496 ; *Aynsley* v. *Glover* (1875), L. R. 10 Ch. App. 283.
(*y*) *Dalton* v. *Angus* (1881), 6 App. Cas. 740, at p. 814.
(*z*) *Jenkins* v. *Harvey* (1835), 1 Cr. M. & R. 877 ; 2 Cr. M. & R. 393.
(*a*) *Rex* v. *Jolliffe* (1823), 2 Barn. & C. 54 ; 3 D. & R. 240 ; *Curtis* v. *Daniel* (1808), 10 East, 272.
(*b*) *Rex* v. *Joliffe*, *supra*.
(*c*) *Goodman* v. *Saltash* (*Mayor*) (1882), 7 App. Cas. 654.
(*d*) *Blewitt* v. *Tregonning* (1835), 3 A. & E. 554.
(*e*) *Gateward's Case* (1607), 6 Rep. 59 b.

(ii.) Under the Prescription Act, 1832.

(*a.*) RIGHTS OF WAY AND OF WATERCOURSE.

(2) Prescription under the Act of 1832.

Secondly, as regards prescription under the 2 & 3 Will. 4, c. 71,—It is (by that Act) enacted,—By s. 2, that no claim to any right of way or of watercourse, which shall have been actually enjoyed (by the person claiming right thereto) without interruption for the full period of twenty years, shall be defeated by showing only that such right of way or of watercourse was first enjoyed at any time prior to such period; and where the right of way or of watercourse has been enjoyed for the full period of forty years, the right is to be deemed absolute and indefeasible,—unless it shall appear that the enjoyment was by virtue of some consent or agreement in writing; and (by s. 5) the enjoyment must, in either case, be expressed to be *as of right*; also, no title whatever (or presumption of title) is to arise from any enjoyment for a less period of time than that appointed by the Act (*f*). And, accordingly, rights of way and of water cannot now be defeated after twenty years' enjoyment by mere proof that they were not, in fact, enjoyed at some period prior to,—or that they first began to be enjoyed shortly prior to,—the commencement of the twenty years; but they may (after such period of enjoyment) be defeated in any other way in which they could before the Act have been defeated,—that is to say, by proof of a grant or license, written or parol; or by proof of the absence or ignorance of the parties affected, or of the impossibility of the grant, or of the unity of seisin of the two tenements; and where there has been enjoyment for forty years, the rights of way and of water are absolute,—*scil.*, unless and until they are defeated; and they can only be defeated (after forty years' enjoyment) by the production of some agreement in writing. It is to be noted, however, that in computing the forty years, the period of any tenancy for life,—also, any term exceeding three years,—are not to be computed, provided the claim is resisted within the three years next after the end of the tenancy or term (*g*); and that nothing is to be deemed an *interruption* of the enjoyment (during the twenty years or during the forty years), unless the act which is relied on as the interruption has been submitted to for one full year after notice

General effect of prescription under the Act,—as to ways, watercourses, etc.

Interruption of enjoyment,—what is, under the Act.

(*f*) *Ivimey* v. *Stocker* (1866), 34 L. J. Ch. 640.

(*g*) Sect. 8; *Bright* v. *Walker* (1834), 1 Cr. M. & R. 220; *Clayton* v. *Corby* (1843), 2 A. & E. (N.S.) 813; *Pye* v. *Mumford* (1848), 11 A. & E. (N.S.) 666.

thereof (*h*) ; also, nothing in the act applies to a so-called easement in gross (*i*),—or personal license (*k*).

INTERMISSION OF, AND EXCESS IN, USER,—EFFECTS OF.

Intermission of the user,—effect of.

A mere intermission of the user of the right is not an interruption of the right (*l*) ; but any such intermission of the user may,—just as any interruption, for however short a time, of the user, will (*m*),—be evidence that the enjoyment never was *of right* ; and, when coupled with other evidence adverse to the right, will be fatal to the claim *as of right* (*n*). Moreover, an intermission in the user, if sufficiently long continued, may amount to (and will be evidence of) an abandonment of the right (*o*) ; and if the right is once abandoned, it is as good as released or extinguished ; and any like right could only be re-created as the original right was (or might have been) created (*p*). But the right will not be destroyed by any mere excess in, or immaterial alteration of, the user (*q*) ; and as to what shall amount to an abandonment of the right, the question is entirely one for the jury, upon all the circumstances of the case (including the character of the right (*r*),—for the Prescription Act itself is silent with respect to loss by non-user. It appears, also, that when the purpose for which an easement has been granted ceases, the easement also ceases,—at least, in the general case (*s*).

Excess in the user,—effect of.

(*h*) *Carr* v. *Foster* (1842), 3 Q. B. 581 ; *Flight* v. *Thomas* (1841), 8 Cl. & F. 231 ; *Glover* v. *Coleman* (1874), L. R. 10 C. P. 108.

(*i*) *Shuttleworth* v. *Le Fleming* (1865), 34 L. J. C. P. 309 ; *Welcome* v. *Upton* (1840), 5 M. & W. 398 ; 6 *Ibid.*, 536 ; 9 L. J. Exch. (N.S.) 154 ; *Mounsey* v. *Ismay* (1865), 34 L. J. Exch. 56 ; *Bailey* v. *Stevens* (1862), 12 Com. B. (N.S.) 91 ; 31 L. J. C. P. 226.

(*k*) *Rangeley* v. *Midland Rail. Co.* (1868), L. R. 3 Ch. 306 ; 37 L. J. Ch. 313 ; *Russell* v. *Harford* (1866), L. R. 2 Eq. 507.

(*l*) *Hall* v. *Swift* (1838), 4 Bing. N. C. 381 ; *Tickle* v. *Brown* (1836), 4 A. & E. 383 ; *Beesley* v. *Clark* (1836), 2 Bing. N. C. 705 ; *Monmouthshire Canal Co.* v. *Hereford* (1834), 1 Cr. M. & R. 614 ; *Ward* v. *Ward* (1852), 7 Exch. 838 ; 21 L. J. Ex. 334.

(*m*) *Eaton* v. *Swansea Waterworks Co.* (1851), 20 L. J. Q. B. 482 ; 17 Q. B. 267.

(*n*) *Gaved* v. *Martyn* (1865), 19 C. B. 732 ; 34 L. J. C. P. 353.

(*o*) Co. Lit. 264 b, 313 a, b ; *Moore* v. *Rawson* (1824), 3 B. & C. 332 ; *Ivimey* v. *Stocker* (1866), 35 L. J. Ex. 467.

(*p*) *Holmes* v. *Goring* (1824), 2 Bing. 83.

(*q*) *Bridges* v. *Blanchard* (1835), 4 A. & E. 176.

(*r*) *Moore* v. *Rawson*, *supra* ; *Cook* v. *Bath* (*Mayor*) (1868), L. R. 6 Eq. 177 ; *Crossley* v. *Lightowler* (1867), L. R. 2 Ch. App. 478.

(*s*) *Mason* v. *Shrewsbury and Hereford Rail. Co.*, (1871) L. R. 6 Q. B. 578 ; *Staffordshire Canal* v. *Birmingham Canal* (1866), L. R. 1 H. L. 254.

RIGHTS IN SUO SOLO.

Rights *in alieno solo* and rights *in suo solo*,—distinguished.

The Prescription Act, 1832, applying only to profits *à prendre*, easements, and other like rights which are exercised *in alieno solo*, has, of course, no application to rights which a man exercises *in suo solo*,—*e.g.*, it has no application to the rights which a copyholder may, by the custom of the manor, exercise within or over his own copyhold or customary tenement (*t*).

(*b.*) EASEMENTS OTHER THAN WAYS AND WATERCOURSES.

All easements (and not merely easements of way and of water), acquirable by prescription, under the Act.

The Prescription Act, 1832, is not confined to easements of way and water, but extends to all easements whatsoever (*u*),—*e.g.*, an easement to relieve one's own lands of flood water (or to prevent their being flooded), and for that purpose to enter upon the lands of one's neighbour, and to open sluices and gates in a stream thereon, may be acquired either under that Act or under the presumption (or fiction) of a lost grant (*x*); and the lord (or other owner) of a common may so prescribe on behalf of himself and all persons having rights of common thereon.

Right to pollute streams with mining water and refuse,—by prescription, or (where custom applicable) by custom.

The owner of a copper mine may lawfully claim, by prescription (whether at the common law or under the Prescription Act), the right to discharge into a pure natural stream mine water,—that is to say, to dig holes on his own land, and to fill them with iron, and to cover the same with water pumped from the mine for the purpose of precipitating the copper contained in such water, and afterwards to let off the water impregnated with metallic substances into the stream (*y*). And the owner of a tin mine may,—within the stannaries of Cornwall, either by prescription or by custom; and elsewhere, by prescription,—claim the right to (in the course of working his tin mine) send or throw sand, stones, rubble, etc., into a natural stream,—so far as is necessary for the due and ordinary working of the mine (*z*).

Right of lord to enter upon allotments

Where the lord of a manor is (and usually he is) entitled to the mines (including the *stone*) within the waste, and such waste

(*t*) *Hanmer* v. *Chance* (1865), 34 L. J. Ch. 413.

(*u*) *Dalton* v. *Angus* (1881), 6 App. Cas. 740; *Simpson* v. *Godmanchester* (*Corporation*), [1897] A. C. 696.

(*x*) *Simpson* v. *Godmanchester*, *supra*.

(*y*) *Wright* v. *Williams* (1836), 1 Mee. & W. 77.

(*z*) *Carlyon* v. *Lovering* (1857), 1 H. & N. 784.

is inclosed or allotted with an exception of the mines to the lord ; and it appears, that the lord has at all times dug the stone in the waste,—entering and digging at his pleasure,—the law is, that such right of entry and digging is lawful, and may be regarded as a necessary incident to the exception of the stone, although it is attended with the most serious damage and inconvenience to the freeholder or allottee ; and as the right may be claimed under an express grant, so it may be claimed by prescription (*a*), although possibly not by custom (*b*).

and dig stone therein,—may be claimed by prescription,—but *semble*, not by custom.

Where an Inclosure Act saved the lord's right to the mines under the allotments, with liberty to work and get them as before, and without paying compensation ; and the Act provided, that for all subsidence damage the allottee should be compensated by the several allottees (*c*),—the court said, that it was not a question of a *customary* right to subside (as in *Hilton* v. *Lord Granville*) (*d*), the Inclosure Act expressly giving the right (although by reference to the former custom of working).

Right of subsidence,—although not by custom yet by Act referring to custom.

In *Wake* v. *Redfearn* (*e*), the defendant had sunk a shaft in the plaintiff's land, under the custom or power in that behalf conferred by the 14 & 15 Vict. c. 94, for getting lead ore ; and he had extended his workings beyond the plaintiff's land (which was situate within and subject to the customs of the king's field in the High Peak) into other lands outside of the last-mentioned customs, but lying within and subject to the (analogous) customs prevailing within the Wirksworth district (and which latter customs were regulated by the 15 & 16 Vict. c. clxiii.) ; and the defendant claimed (under the customs in that behalf) to deposit on the plaintiff's land spoil and mine refuse brought up the shaft, although coming out of the workings in Wirksworth; but the court said, that he was not entitled to do so,—for servitudes arising by custom are to be construed strictly, like other servitudes are.

Customary right to deposit mine-refuse,—not to be extended further than the custom warrants.

PRESCRIPTION AND CUSTOM DISTINGUISHED.

Although the Prescription Act, 1832, applies to claims by custom as well as by prescription, still it is necessary, for certain purposes at least, to distinguish between prescription and

Prescription and custom distinguished.

(*a*) *Rogers* v. *Taylor* (1857), 1 H. & N. 706.

(*b*) *Broadbent* v. *Wilks* (1744), Willes, 360 ; 1 Wils. 63 ; *Hilton* v. *Lord Granville* (1844), 5 Q. B. 701.

(*c*) *Gill* v. *Dickinson* (1880), 5 Q. B. D. 159, overruling *Beckett* v. *Bradley* (1862), 31 L. J. Q. B. 65.

(*d*) (1849), 5 Q. B. 701 ; 13 L. J. Q. B. 193.

(*e*) (1880), 43 L. T. (N.S.) 123.

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PRESCRIPTION AND CUSTOM.

custom; and prescription differs from custom, in that custom is a local usage, whereas prescription is annexed to the person, —or (speaking more accurately) is annexed to the ownership of particular lands, being either *in a que estate* or in a *man and his ancestors* in respect of the particular lands.

(1) Custom is local,—prescription is personal.

A title by prescription is capable of being released; but a custom cannot be so discharged,—although a customary right, as enjoyed in respect of any particular tenement, may be discharged by the enfranchisement of such tenement,—or may, *semble*, be released by the fee simple owner of the tenement,—*scil.*, because he might sell the right; and if he sold it to the lord, he might convey it to him so as to effect its release.

(2) A custom cannot,—but a prescription can,—be released.

A custom must be reasonable, and the customary right must be exercised in a reasonable manner; but a right by prescription need not be (although it usually is) a reasonable right, and to be reasonably exercised. Also, custom and prescription agree in this, that they must be certain, and (save where the Prescription Act, 1832, applies) of immemorial antiquity. And neither by custom nor by prescription, can a right to the very soil itself, in exclusion of the lord or landowner, be established.

(3) Custom bad,—if unreasonable; but prescription not necessarily so.

In *Wilson* v. *Willes* (*f*), where the copyhold and other customary tenants of the manor of Hampstead asserted a right by *custom* to take sods or turf from the waste of the manor *ad libitum* for the improvement of their gardens and for embanking their tenements, the court considered the alleged customary right to be destructive of the common,—and the custom was therefore unreasonable and bad accordingly. And in *Clayton* v. *Corby* (*g*), where the defendant claimed by *prescription* a right to dig, take, and carry away from the close of the plaintiff as much clay as he (the defendant) should from time to time, and at any time in the year, require for making bricks at his (the defendant's) brick-kiln,—the court considered, that the claim amounted to an exclusion of the plaintiff, and held that it was bad accordingly,—for a prescription was not different from a custom in this respect.

Custom to take *ad libitum*,—turf from waste;

or clay,—from private close.

In *Wilkes* v. *Broadbent* (*h*), a claim by custom to deposit mine rubbish on the surface *ad libitum* was held bad,—as being destructive of the whole profits of the surface; and in *Hilton* v. *Lord Granville* (*i*), a claim by custom to damage the surface by

Custom to destroy the surface, with spoil, or by subsidence.

(*f*) (1806), 7 East, 121.
(*g*) (1843), 5 Q. B. 415; 14 L. J. Q.B. (N.S.) 364.
(*h*) (1744), Willes, 360; 1 Wils. 63.
(*i*) (1844), 5 Q. B. 701.

subsidence was held bad,—for the like reason. Nor, *semble*, would either of these two claims, if based upon prescription (that is to say, upon lost grant or implied grant), have been good (*k*),—although each of these two rights might be given by express grant (*l*),—and that either subject to (*m*) or not subject to (*n*) paying compensation for the damage.

(4) The proof of a custom,—and the proof of a prescription,—are different.

In *Blewitt* v. *Tregonning* (*o*), which was an action of trespass for taking sand (drifted from the sea-shore) on the plaintiff's close, and the defendant pleaded a right by custom to take the sand, and also a right by prescription to do so,—giving the same evidence in support of each alleged right,—The court held the custom void for indefiniteness, and also because it purported to entitle a man to a profit *à prendre in alieno solo*, and a custom could not do that,—save as regards copyholders claiming the right in the lord's waste. And the court doubted, whether a prescriptive and a customary right to the same privilege could by possibility exist in one and the same claimant; but said, that the two rights were so very different (the customary right being for the defendant in common with others similarly circumstanced, and the prescriptive right being for the defendant alone), that the same evidence (of enjoyment) could not prove both.

Rights of copyholder,—in waste of his own manor, and in waste of foreign manor,—distinguished.

Where the right to dig and take stone, sand, or the like *in alieno solo* is claimed, and the claim is not by express grant or by express license in that behalf, the claim can, in the general case, be made out by *prescription* only and not by *custom* (*p*). However, where the copyhold (or customary) tenant of a manor claims the right, *and he claims it in respect of the waste of that manor*, then the claim can be well made out (and in fact must, in that case, if it can be made out at all, be made out) by *custom* and not by *prescription* (*q*). But where the claim of the copyholder or customary tenant is *in respect of the waste of a foreign manor* (that is to say, of a manor other than the manor of which the copyhold tenement is parcel),

(*k*) *Rogers* v. *Taylor* (1857), 1 H. & N. 706; *Carlyon* v. *Lovering* (1857), 1 H. & N. 784; *Att.-Gen.* v. *Mathias* (1858), 27 L. J. Ch. 761.

(*l*) *Buchanan* v. *Andrew* (1873), L. R. 2 H. L. Sc. 286; *Aspden* v. *Seddon* (1875), 10 Ch. D. 394.

(*m*) *Aspden* v. *Seddon* (1876), 1 Ex. D. 496.

(*n*) *Hext* v. *Gill* (1872), L. R. 7 Ch. App. 699.

(*o*) (1835), 3 A. & E. 554.

(*p*) *Gateward's Case* (1607), 6 Rep. 59 b; *Blewitt* v. *Tregonning* (1835), 3 A. & E. 554; *Att.-Gen.* v. *Mathias* (1858), 4 K. & J. 579, at pp. 590, 591.

(*q*) *Rex* v. *Churchill* (1825), 4 B. & C. 755; *Rogers* v. *Brenton* (1847), 10 Q. B. 26; *Constable* v. *Nicholson* (1863), 14 C. B. (N.S.) 230.

then and in that case the claim must be made out by prescription and not by custom,—and the copyholder in such a case prescribes through and in the name of his lord (*r*).

PERSONS INCAPABLE OF ACQUIRING BY PRESCRIPTION.

Persons too imbecile,—or too indefinite, to claim by prescription.

An occupier cannot, *as such*, claim by prescription (*s*) ; and neither can an *inhabitant* as such (*t*), nor a *parishioner* as such (*u*), nor a *burgess* as such (*x*),—save, if at all, through and in the name of the owner of the fee, or through or in the name of the town or parish or borough being incorporate (*y*). And in *Constable* v. *Nicholson* (*z*), where the plaintiff claimed to be owner of a certain foreshore (as parcel of his manor of H.), and the defendant had dug and taken gravel, sand, stones, etc., from the foreshore, under a claim of right to do so for the repair of certain roads in the township of O. adjoining,—and the claim purported to be by prescription as one of the inhabitants of O. and by the direction of the other inhabitants, and also of the overseers, of that township,—The court held, that the claim, although in form a claim by prescription, was in reality a claim by custom, and (being for a profit *à prendre in alieno solo*) was bad, WILLES and BYLES, JJ., observing (in effect) as follows :—By *custom*, you may claim an easement *in alieno solo*, but not a profit *à prendre*,—the only difficulty ever experienced being in distinguishing between what is an easement and what is a profit ; and by *prescription* you may claim both an easement and also a profit *à prendre in alieno solo*. But you cannot prescribe (as the defendant purports to do) through or under the inhabitants of O., (nor yet through or under the overseers of O.) without alleging them to be a corporate body. And note, that although the foreshore was (or was in the nature of) waste lands of the plaintiff's manor, still, the defendant not purporting to rest his claim upon any custom of the manor, the decision of the court (or the observations of

(*r*) *Barwick* v. *Matthews* (1814), 5 Taunt. 365.

(*s*) *Davies* v. *Williams* (1851), 16 Q. B. 546.

(*t*) *Gateward's Case*, *supra* ; *Chilton* v. *London* (*Corporation*) (1878), 7 Ch. D. 735 ; and distinguish *Paddwick* v. *Knight* (1852), 7 Exch. 854.

(*u*) *Allgood* v. *Gibson* (1876), 34 L. T. 883 ; 25 W. R. 60.

(*x*) *Parry* v. *Thomas* (1850), 5 Exch. 37 ; *Beadsworth* v. *Torkington* (1841), 1 Q. B. 782.

(*y*) *Mellor* v. *Spateman* (1681), 1 Wms. Saund. 339 ; *Johnson* v. *Wyard* (1688), 2 Lutw. 1344 ; *Parry* v. *Thomas*, *supra* ; *Goodman* v. *Saltash* (*Mayor*) (1882), 7 App. Cas. 633 ; *Edwards* v. *Jenkins*, [1896] 1 Ch. 308.

(*z*) (1863), 14 C. B. (N.S.) 230 ; and see *Lockwood* v. *Wood* (1844), 6 Q. B. 50 ; and *Bailey* v. *Stephens* (1862), 12 C. B. (N.S.) 91.

the judges) upon his claim did not throw (and are not to be read as throwing) any doubt upon the right of a copyholder to claim by the custom.

RIGHTS IN ALIENO SOLO,—NECESSARY LIMIT TO.

Rights *in suo solo*, being releasable,—and rights *in alieno solo*, not being releasable, unlimited or limited accordingly.

Every claim of right to dig and take stone, sand, or the like *in alieno solo*, where it is made out by prescription or where (in the case of copyholders) it is made out by custom, must (in order to be valid) be put forward with some limitation; a claim, *e.g.*, by the owner of a brick-kiln of the right to dig and take from the soil of another so much clay as should at any time be required by him for making bricks at the brick-kiln, and to do so in every year and at all times of the year, is bad,—as being unreasonable, *scil.*, because it is like taking away the whole soil of the close (*a*). On the other hand, where the right is to be exercised *in suo solo* (that is to say, in a man's own land, and not in the land of another), the claim is, of course, good enough in the case of freeholds,—and without any limit; and it may also, although without limit, be good in the case of copyholds, provided the custom warrant it (*b*),—*scil.*, because such a custom, seeing that it affects only the copyhold tenement itself, would be discharged on an enfranchisement of that tenement, differently from a custom affecting a third person's land which cannot be released at all (*c*).

REPUTATION AS EVIDENCE.

Reputation is evidence of custom, but not of a prescription.

A claim to dig and take stone (or other mineral) in the waste of a manor may arise (in the case of freehold tenants) either by prescription or by custom,—but (in the case of copyhold tenants) by custom only. And when the claim is by prescription,—as where the freeholder claims in right of his freehold tenement,—acts of ownership, constantly exercised and in face of the lord, will establish the right (*d*),—and that although the general right of the lord to the stone in the waste

(*a*) *Clayton* v. *Corby* (1843), 5 Q. B. 415; Co. Litt. 122; *Arlett* v. *Ellis* (1827), 7 B. & C. 346; *Rogers* v. *Taylor* (1857), 1 H. & N. 706; *Wilson* v. *Willes* (1806), 7 East, 121; *Att.-Gen.* v. *Mathias* (1858), 4 K. & J. 579 at pp. 591, 592.

(*b*) *Lord Salisbury* v. *Gladstone* (1860), 6 H. & N. 123; 7 H. L. Cas. 692; *Hanmer* v. *Chance* (1865), 34 L. J. Ch. 413; 11 Jur. (N.S.) 397; 4 De G. J. & S. 626.

(*c*) *Gateward's Case*, *supra*; *S. C.* (*sub. nom. Smith* v. *Gatewood*), Cro. Jac. 152; *Grimstead* v. *Marlowe* (1759), 4 T. R. 717.

(*d*) *Morewood* v. *Wood* (1792), 14 East, 327 n.

may be proved by some manorial document (presentment) signed by some predecessor in title of the freeholder (*e*) ; but in such a case, no evidence of reputation (as *e.g.*, a presentment not signed by such predecessor in title) is admissible in support of the right (*f*),—not even, *semble*, in aid of other proper evidence of the right (*g*). But where the claim is by custom, reputation would be admissible evidence ; although, of course, it would not be conclusive evidence,—*scil.*, because it might conceivably be rebutted by other evidence, as, *e.g.*, by a presentment to the contrary, although unsigned by any predecessor in title (*h*).

PROOF OF, ALSO VALIDITY OF, CUSTOM.

Proof of a custom,—is for the jury ; and after verdict, is by the verdict.

The existence of a custom, when it is in dispute, is a matter proper to be determined by a jury (*i*),—although it may also be determined by the judge acting as a jury ; and a court of equity was in the habit of ascertaining a disputed custom, either by a reference to the master (chief clerk) (*k*) or (at the request of either of the parties) by directing an issue to be tried at the assizes (*l*). But once the custom has been found, and the verdict finding it has been recorded in the court, the proof of it afterwards would be by the record,—and not by a further finding of a jury (*m*).

Validity of custom,—is a question for the judge.

The validity of an alleged custom, once the fact has been found, is exclusively for the judge acting as judge ; and is not for the jury (*n*).

ORAL AND DOCUMENTARY EVIDENCE OF CUSTOM.

(*a.*) DOCUMENTARY EVIDENCE.

The evidence of a custom may be either documentary or oral,—or partly one and partly the other ; and documentary evidence is greatly aided, in general, by oral evidence of the customary right having been put in use ; but when the oral evidence of actual usage is in conflict (or in apparent conflict)

(*e*) *Moorewood* v. *Wood* (1792), 14 East, 327 n.
(*f*) *Ibid.*
(*g*) *Ibid.*
(*h*) *Ibid.*
(*i*) *Mortimer* v. *Pettifer* (1611), Cro. Jac. 302 ; *Edwin* v. *Thomas* 1688), 2 Vern. 75.
(*k*) *Edwards* v. *Fidel* (1818), 3 Madd. 239.
(*l*) *Roskell* v. *Whitworth* (1870), L. R. 5 Ch. App. 459.
(*m*) 1 Bla. Com. 76 ; *Jewell* v. *Horward* (1616), 1 Roll. Rep. 263.
(*n*) *Bastard* v. *Smith* (1837), 2 Moo. & R. 129.

with the documentary evidence, very difficult questions arise (*o*). And as regards the documentary evidence of a custom, it appears that the following documents are admissible as evidence, whatever their weight may be when admitted, that is to say :—

Documentary evidence of a custom,—what documents are admissible.

(1.) A verdict,—*scil.*, because reputation even would be evidence of a customary right of way, or of a public right of way (*p*) ; and *à fortiori* therefore the finding of a jury on their oaths, the jurors being men of the vicinity ; and when a verdict is adduced in evidence of a customary right, the fact that it was *res inter alios acta* is of no consequence (*q*).

(1) Verdict.

(2.) A decree in chancery,—whereby customs are ratified (*r*). For it is essential to the action in which such a decree is pronounced, that the tenants as well as the lord of the manor shall have been made parties ; and in fact, such decrees have in many cases been obtained, after an agreement declaring the custom has been arrived at between the lord and the tenants, and which agreement they desire to have affirmed by the decree (*s*) ; and a statute declaring the customs has also not infrequently been confirmed by such a decree (*t*).

(2) Decree in chancery.

(3.) Depositions made in a chancery suit,—*scil.*, because these are made in respect of a common claim and by persons standing *in pari jure* (*u*) ; and these depositions,—the parties who made them being, of course, dead,—are at least entitled to be received as evidence of reputation, and upon a question of custom, equally as the declarations of deceased persons generally who had a sufficient connection with (and knowledge of) the locality and its customs.

(3) Depositions in chancery.

(4.) Deeds between (and executed by) the lord and certain copyholders purporting to declare and to ratify the customs : Thus, in *Anglesey* (*Marquis*) v. *Hatherton* (*x*), where the plaintiff was the lord of the manor of C., and the defendant was a copyhold tenant of the manor who had dug certain coal, limestone, and ironstone within his tenement, and the claim was in respect thereof ; and the question raised was only as to the existence of

(4) Agreements between lord and tenants.

(*o*) *Anglesey* (*Marquis*) v. *Hatherton* (1842), 10 Mee. & W. 218.

(*p*) *Reed* v. *Jackson* (1801), 1 East, 355, at p. 357.

(*q*) Bull. N. P. 233 ; Peake's Evidence, 441 ; *City of London* v. *Clarke* (1692), Carth. 181.

(*r*) *Price* v. *Woodhouse* (1849), 3 Exch. 616.

(*s*) *Anglesey* (*Marquis*) v. *Hatherton* (1842), 10 Mee. & W. 218.

(*t*) 21 Jac. 1 (1624),—as regards the customs of the manors of Stepney and Hackney.

(*u*) *Cort* v. *Birkbeck* (1779), Doug. 219 ; Bull. N. P. 233 ; *Weeks* v. *Sparke* (1813), 1 M. & S. 679 ; *Nichols* v. *Parker* (1805), 14 East, 331 n.

(*x*) (1842), 10 Mee. & W. 218.

a general custom in the manor for the copyholders to dig for coals, etc., within their tenements,—The defendant adduced in evidence of the alleged custom (1) numerous instances of mines having been worked by the copyholders within their tenements; (2) some leases by copyholders of their tenements together with the mines thereunder; (3) some surrenders in which the minerals were either excepted to the surrenderors or were expressly conveyed to the surrenderees; and (4) the customs of an adjoining manor (alleged to have at one time formed parcel of the manor of C.): And the plaintiff put in evidence a deed dated in 1605, and made between the then lord of the manor and certain copyholders holding of the manor, and which deed, although it purported to enumerate and to confirm and allow all the manorial customs, made no mention of the alleged custom as to minerals,—The court rejected the evidence of the customs of the adjoining manor altogether; and held that the other evidence adduced by the defendant was displaced by the enumeration of customs contained in the deed of 1605 (and by a decree of the court of chancery dated November 29th, 1606, confirming the deed),—Lord ABINGER, C.B., observing:—"A custom lies in reputation,—that is to say, you prove a *usage* as far back as living memory goes, and beyond that you give evidence of *reputation*; and if therefore you show, that, on a particular occasion beyond living memory, half the tenants agreed what the customs were, and did not (in their enumeration thereof) include the custom which is in question, that is evidence of reputation, and is admissible. And beyond that, the defendant being proved to derive title as to one or more of his copyhold tenements under one of the copyholders who were parties to the deed of 1605, the deed is evidence (in the strictest sense of the word) as against the defendant. And the omission of the custom which is in question is a very remarkable circumstance,—*scil.*, because if that custom existed, it is incredible that it should not have been included in the express enumeration of the customs."

(5) Entries on court rolls, coupled with usage.

(5.) Reputation is evidence of a custom (*y*); but the reputation which is to prove a customary right to dig and get mines must either (as, in general, it does) consist of, or else must be accompanied by, notorious acts of ownership,—and without these acts, the mere production of grants, leases, and licenses, will be

(*y*) *Doe* d. *Foster and Another* v. *Sisson* (1810), 12 East, 62; Bull. N. P. 248; *Denn* v. *Spray* (1786), 1 T. R. 466; *Prichard* v. *Powell* (1845), 10 Q. B. 589.

entitled to little weight (*z*) ; and entries of presentments in the books of a manor are, at the most, evidence of reputation, but are not considered acts of ownership (*a*). Also, the courts rolls of a manor, although admissible as evidence between the lord and his tenants (*b*), are not evidence for or against strangers (*c*); and court rolls not being records, error in them may be shewn (*d*). The court rolls may be proved by copies thereof under the hand of the steward, or by examined copies thereof sworn to be true (*e*) ; and entries of the steward, above thirty years old, need not be verified (*f*).

(6.) Crown extents and surveys.

(6.) In *Rowe* v. *Brenton* (*g*), it was said, that all statutes which affected the possessions or revenues of the duchy of Cornwall were to be deemed public Acts, on account of the interest of the crown in the duchy : And for the same reason, the enrolments of leases granted by the duke were held admissible in evidence : Also, an extent of crown lands found in the proper office, and containing internal evidence of its authenticity,—Although as regards private individuals and their private possessions, their estate acts would be private acts and not admissible in evidence as against third persons (*h*); and the memorial of the enrolment of leases of such estates would not be admissible as against third parties (*i*) ; and a private extent (or survey) would not be admissible, save as between the parties to it and their privies (*k*).

(7.) Private extents and surveys.

(7.) In *Beaufort* (*Duke*) v. *Smith* (*l*), which was an action by the plaintiff (as lord of the manor) for a toll or customary payment of fourpence per wey of all coals dug or gotten within the manor and exported,—the plaintiff proposed to put in evidence of the custom (or of the immemorial payment) a " Survey of the

(*z*) *Rowe* v. *Brenton* (1828), Conc. Rep., *per* PARKE, J. ; *Brown* v. *Rawlins* (1806), 7 East, 409.

(*a*) *Irwin* v. *Simpson* (1758), 7 Bro. P. C. 317.

(*b*) *Warriner* v. *Giles* (1733), 2 Stra. 955 ; *Humble* v. *Hunt* (1817), 1 Holt. 601 ; *Love* v. *Bentley* (1707), 11 Mod. 134 ; *Parrott* v. *Palmer* (1834), 3 M. & K. 638.

(*c*) *Att.-Gen.* v. *Hotham* (*Lord*) (1823), 1 Turn. 217.

(*d*) *Snow* v. *Cutler* (1683), 1 Keb. 567 ; *Brend* v. *Brend* (1676), Fin. Rep. 254 ; *Burgess and Foster's Case* (1583), 4 Leo. 215 ; *Hill* v. *Wiggett* (1706), 2 Vern. 547 ; *Doe* d. *Priestly* v. *Calloway* (1827), 6 Barn. & C. 484 ; 9 Dowl. & R. 518.

(*e*) *Snow* v. *Cutler*, *supra* ; *Lee* v. *Boothby* (1684), 1 Keb. 720 ; *Chance* v. *Dod* (1733), 2 Barn. 406 ; *Street* v. *Roper* (1733), 12 Vin. 214 ; *Rowe* v. *Brenton* (1828), 3 Man. & R. 296.

(*f*) *Wynne* v. *Tyrwhitt* (1821), 4 Barn. & Ald. 376.

(*g*) (1829), 8 B. & C. 737.

(*h*) *Beaufort* (*Duke*) v. *Smith* (1849), 4 Exch. 450.

(*i*) *Molton* v. *Harris* (1796), 2 Esp. 549.

(*k*) *Bridgman* v. *Jennings* (1699), 1 Ld. Raym. 734.

(*l*) (1849), 4 Exch. 450 ; 19 L. J. Ex. (N.S.) 97 ; following *Evans* v. *Taylor* (1838, 7 A. & E. 617.

Lordship" made in 1650, in which the fourpence per wey was mentioned as due to the lord ; and the defendant objected to its reception, on the ground that it was not a document of a public nature, and that (although purporting to be made by virtue of a commission given by Cromwell as Lord Protector) the commission was not produced or its loss (or even its existence) proved ; and the court upheld the objection,—observing, nevertheless, that if the survey had been ordered by the rightful sovereign and in respect of the crown demesnes, it would have been admissible as a public document,—*scil.*, upon proof of the commission or of its loss, or upon internal evidence of the authenticity of the survey (*m*).

(*b.*) ORAL EVIDENCE.

Oral evidence of custom,—usage is the best.

As regards oral evidence, usage is, in general, the best oral evidence of a custom, or customary right,—and it is entitled to the greatest weight (*n*). And where the tenants of a manor claimed the coal within or under their tenements, and there was no evidence that the tenants had even gotten the coal, and there was abundant evidence that the lord (or his lessees) had uniformly, and for over a century, gotten the coal, and also the limestone, within and under the tenements, that usage was deemed to be decisive, against the tenants and in favour of the lord (*o*). On the other hand, the usage may be such as to show, that the tenants of the manor (even the copyhold tenants) may be entitled to the mines,—*e.g.*, to the copper mines as well within their own tenements as within the waste lands of the manor (*p*).

The usage may even evidence a grant,—of the mines, or of some of them.

And, as pointed out by Lord ELLENBOROUGH, C.J., in *Curtis* v. *Daniell* (*q*), there may (within one and the same manor) be one custom entitling the lord to the tin mines (or other particular mines), and another custom entitling the tenants to the copper mines (or other particular mines) ; and the usage which establishes the right of the lord to the one, may also establish the right of the tenants to the other ; and where the tenants had had adverse possession of the copper mines for above twenty years,—and had also habitually and openly worked these mines,—the right of the tenants to them was considered proved ; for,

(*m*) *Rowe* v. *Brenton* (1829), 8 B. & C. 737.

(*n*) *Brown* v. *Rawlins* (1806), 7 East, 409, at p. 435.

(*o*) *Ibid.*

(*p*) *Curtis* v. *Daniell* (1808), 10 East, 273.

(*q*) (1808), 10 East, 273, at p. 277.

as BAYLEY, J., observed, the copyhold grant might lawfully have comprised the copper mines, and a grant of that wide extent was to be inferred from the acts of ownership of the tenants,—*scil.*, from the usage.

Usage may also supply the contents of a lost grant;

And in *Stanley* v. *White* (*r*), it was stated by the court, that the terms of an ancient grant which had been lost, were to be collected from the manner in which the right claimed to have been derived under it had been exercised; and that a title consistent with the usage might be implied from the usage.

and is always available,—to remove an ambiguity in an ancient document.

And, of course, long-continued usage will always be admissible, in aid of the construction of a very ancient deed of grant,—*scil.*, where there is any ambiguity in the construction (*s*).

One act of user,—effect of, as proof of custom.

A single instance of the exercise of an alleged customary right,—in other words, a single instance of the custom having been put in use,—will sometimes prove the custom (*t*); for one undisturbed act of ownership, although it would not make a custom, still it would be evidence of a custom (*u*),—unless it was explained away as a mere accidental act, or as a usurpation. But as regards mines, a succession of notorious acts of ownership is required, to establish a customary right in the tenant to dig and get the mines (*x*).

Declarations accompanying acts of ownership.

Declarations accompanying acts of ownership,—or of forbearance,—are themselves part of the acts; and are evidence accordingly (*y*). But where the acts of ownership are consistent with either a life estate or a fee simple estate in the tenant, they will not aid at all in proving which of these two estates was vested in the tenant (*z*); and the declarations of the tenant accompanying the acts will be equally inefficacious for this purpose (*a*); nor will evidence of reputation be admissible for this purpose. And note, that an act of ownership may itself be evidenced by an ancient document (*b*).

(*r*) (1811), 14 East, 332, at p. 342.
(*s*) *Beaufort* (*Duke*) v. *Swansea* (*Mayor*) (1849), 3 Exch. 413; *Bristow* v. *Cormican* (1878), 3 App. Cas. 641.
(*t*) *Doe* d. *Mason* v. *Mason* (1770), 3 Wils. 63.
(*u*) *Roe* d. *Bennett* v. *Jeffrey* (1813), 2 M. & S. 92.
(*x*) *Curtis* v. *Daniell* (1808), 10 East, 273.
(*y*) *Stanley* v. *White* (1811), 14 East, 332, at p. 339.
(*z*) *Doe* d. *Didsbury* v. *Thomas* (1811), 14 East, 323.
(*a*) *Papendick* v. *Bridgewater* (1855), 5 El. & Bl. 166.
(*b*) *Malcolmson* v. *O'Dea* (1863), 10 H. L. Cas. 593; *Blendy-Jenkins* v. *Dunraven* (1899), 2 Ch. 121.

DOCUMENTARY EVIDENCE AND ORAL EVIDENCE,—WHEN CONFLICTING.

When the evidence for and against an alleged customary right consists in part of documentary evidence and in part of acts of ownership, and there is an apparent conflict between the two species of evidence, each must be closely scrutinised,—and sometimes the acts of ownership will prevail, and sometimes the documentary evidence will prevail. But sometimes (although rarely) the apparent conflict may be reconciled, the two kinds of evidence admitting of an interpretation which renders them both consistent. Thus, in *Morewood* v. *Wood* (*c*), the documentary evidence was taken to prove the *general* right of the plaintiff; and the acts of ownership were taken to prove a *particular* right in the defendant,—which particular right he had acquired by prescription.

(1) Where reconciliation possible.

But more usually the documentary evidence will be found to overrule the effect of the so-called acts of ownership,—at all events, where the right is claimed as a customary right (and not by prescription). Thus, in *Anglesey* (*Marquis*) v. *Hatherton* (*d*), which was an action of trover for coal, limestone, and ironstone dug and gotten by the defendant out of his copyhold tenement, the plaintiff (the lord of the manor) produced a deed dated in 1605, and made between the then lord and his then copyhold tenants (or some of them, including the predecessor in title of the defendant), whereby (and by a decree in Chancery confirming it) the customs of the manor were declared,—and in such deed no customary right for the copyholders to get the mines within their own tenements was mentioned,—and the court held that the so-called acts of ownership were merely acts of usurpation on the part of the defendant, and could not confer on him any right (*scil.*, by custom) contrary to the findings of the customs contained in the deed.

(2) Where reconciliation not possible.

Also, in *Portland* (*Duke*) v. *Hill* (*e*), where the copyholder (or customary tenant) claimed by custom a right to dig and get the coals within his own customary tenement; and the lord of the manor produced a custumal or inquisition of the customs of the manor prepared about the reign of Edward the Sixth, and in which custumal the only paragraph relating to the mines was a power for the tenants to dig in the wastes of the manor for

(*c*) (1792), 14 East, 327 n.
(*d*) (1842), 10 Mee. & W. 218; 12 L. J. (N.S.) Ex. 57.
(*e*) (1866), 35 L. J. Ch. 439.

stone, coals, and marle, *as estovers* ; and the lord produced also a decree in 1578, after the inquisition, which had settled some disputes as to the right of working coal in the wastes ; and the copyholder in proof of his claim showed that the coal had been worked by certain of the tenants within their own particular tenements for 110 years, but did not prove any such acts of ownership within his own particular tenement,—the court held, that no *general* custom could be established in contravention of the manorial inquisition ; and that the customary tenant, therefore, had not shown any right to work coal in his own tenement.

DOCUMENTARY PROOFS,—EFFECT OF CONFLICT BETWEEN.

Conflict in the documentary proofs themselves,—effect of usage, in case of.

In a contest between the lord and his tenants, as to whether the minerals within the customary tenement are the property of the lord or of the copyholder or customary tenant,—if there is any uncertainty in the effect of, or any apparent conflict between, the documents produced in evidence, that uncertainty will be removed, and apparent conflict settled, by proof of acts of ownership,—that is to say, if it be shown that the lord has habitually excepted the mines in his surface grants, and has also (personally or by his lessees of the mines) worked the mines continuously, that evidence will be conclusive of the lord's right (*f*).

INTERESTED WITNESSES.

Evidence of copyholder,—admissible.

The evidence of a copyholder, called as a *witness*, is admissible in proof of a custom,—although the custom should be one which, if established, will be for his own advantage,—all objections to the admissibility of the evidence of interested parties on the ground of their interest in the verdict having long since been removed ; his evidence, therefore, of a custom for all the copyholders of a manor to get stone out of the quarries within the manor,—concurrently, *semble*, with the right of the lord or of the lord's lessee of the quarry,—is admissible (*g*), although his interest in the verdict will go to affect the weight to be attached to his evidence.

(*f*) *Brown* v. *Rawlins* (1806), 7 East, 409.

(*g*) *Hoyle* v. *Coupe* (1842), 9 Mee. & W. 450 ; 3 & 4 Will. 4, c. 42, ss. 26, 27.

CUSTOMS OF ADJOINING MANORS.

Customs of one manor,—when and when not evidence in another manor.

In general, the customs of one manor are not admissible to control or explain the customs of another manor (*h*). But there are exceptions to this rule ; for where a custom affects a whole district,—as where it appears that divers manors have sprung from some common origin, or have been subject to a common experience and history, whereby their mutual relations to each other have been established (*i*),—in either of such cases, the evidence of the custom in one manor,—or in one part of the district,—will be evidence of the custom in the other manors also, and in the other parts of the district. Thus, in *Rowe* v. *Brenton* (*k*), where it was objected, that evidence of a custom (as to the toll of copper) in one manor could not be admitted to prove a custom in another, unless both were at the time of legal memory in possession of the same person, and formed part of the same district ; but it was proved that a general similarity prevailed (and since the 7 Edw. 3 had prevailed) in all the manors,—the evidence was admitted, Lord TENTERDEN, C.J., relying upon the similarity of the tenure throughout the district.

In *Ely* (*Dean and Chapter*) v. *Warren* (*l*), HARDWICKE, L.C., said, that, as a general rule, evidence of the customs of one manor is not admissible in proof of the customs of another (although adjoining) manor ; but that, where (as in the case of the mines in Derbyshire) there was a pervading similarity between or among the adjoining manors,—and which similarity existed also among the manors situate within the fen country,—the evidence would be admissible,—*scil.*, as regards (in the fen country) the cutting of turf by the copyholders upon the lord's waste ; for that was a matter similarly circumstanced in all the manors.

USAGES OF ADJOINING DISTRICTS.

Usage (consisting in acts of ownership) in one part of a district,—evidence in another part of the same district.

Acts of ownership,—or the usage established thereby,—in one or more places (parts of any defined district) would be evidence of a general right over the whole district,—for, in such a case, the presumption of law would be, that the right was reserved over the whole district, upon the original grant of the

(*h*) *Somerset* v. *France* (1739), 1 Stra. 654 ; Fortes. 41 ; *Dean and Chapter of Ely* v. *Warren* (1741), 2 Atk. 189 ; *Roe* v. *Parker* (1792), 5 T. R. 30.

(*i*) 1 Lord Hale de Jure Maris, pars prima, c. 6 ; *Rowe* v. *Brenton* (1828), 8 Barn. & C. 758 ; 3 Man. & Ry. 144, 229.

(*k*) (1829), 8 Barn. & C. 758.

(*l*) (1741), 2 Atk. 189.

district, and that the whole district (with such reservation) was comprised in the original grant,—although the district had since been divided into divers parcels amongst divers owners (*m*),—so that a *freehold* interest even might be so created (*scil.*, by such general reservation), upon the original freehold grant of the district to another,—*e.g.*, in the trees (*n*), just as in the mines.

Also, in *Barnes* v. *Mawson* (*o*), where the freehold owner of certain surface lands brought an action of trespass for coals gotten and raised under his estate, and the defendant claimed under the lord of the manor, who (as he contended) was entitled to all the coals within a certain district of the manor called the *new land*,—being land formerly taken in and inclosed from the commons of the manor, and which (as such) was distinguished from another district in the manor called the *old land*, within which latter district the defendant admitted that the freeholders (and not the lord) were entitled to the coals,—it being proved that the land in question was within the district of the *new land*, and that acts of ownership had been exercised by the lord of the manor over the coals lying within the *new land*, evidence of reputation within the manor was admitted, such evidence being to the effect, that the right to the coals within all the *new land* belonged to the lord, but not the right to the coals under the *old land*,—Lord ELLENBOROUGH observing, that the only evidence on the part of the plaintiff was the presumption of law arising from his being the freehold owner of the land ; and that, although there were no documents to show how or when the right or reservation claimed by the lord commenced, yet that such right did exist as to the *new land*, standing not on the evidence of one or two instances of its exercise, but on an uniform exercise and enjoyment of the right as far back as living memory would reach ; and he said, that the evidence of reputation was received as to the limits of the *new land*, and as to the *general* right of the lord over it ; and the evidence of the general indiscriminate exercise of the right over the *new land* showed that every part of the *new land* lay within the general ambit of the lord's right.

PRELIMINARY PROOF OF COMMON ORIGIN.

Preliminary proof required,—of

But, of course, as was pointed out in *Tyrwhitt* v. *Wynne* (*p*), it must in all such cases be first established that the *locus in quo*

(*m*) *Stanley* v. *White* (1811), 14 East, 332.
(*n*) *Ibid.*
(*o*) (1813), 1 M. & S. 84.
(*p*) (1819), 2 Barn. & Ald. 554.

common origin of the two manors,—

is part of one entire *district* (honour or manor) ; and it is only when that preliminary proof has been given, that it is competent to give in evidence acts done on other parts of the district (honour or manor) in order to show the right in respect of the *locus in quo*. And this preliminary proof of a common origin has been compared to the proof that in a particular manor borough-English prevails,—whereupon you may see from other manors what the peculiarities of borough-English are ; and to the proof that in a particular manor gavelkind prevails,—whereupon you may see what are the customs of gavelkind in other manors (*q*). And in *Rowe* v. *Brenton* (*r*), the question was one of *tenure* really, and was to ascertain what were the incidents of a particular tenure ; and it being shown that the same tenure existed throughout a certain district, all the incidents of the tenure throughout the district were admissible in evidence ; and the question in *Somerset* (*Duke*) v. *France* (*s*) was also one of *tenure*.

either (1) of tenure ;

or, (2) of sub-infeudation, prior to 18 Edw. 1.

It follows, therefore, that the preliminary proof of a common origin will not suffice in every case, or as regards every custom or usage, to import the customs or usages of one place into another. Thus, in *Blackett* v. *Bradley* (*t*), where such preliminary proof was given,—whereby it appeared that both places had been originally parts of a waste or common which had been enclosed under the provisions of an Inclosure Act,—it was ruled, that evidence of a custom or usage in the one place (the alleged custom being to work the mines without leaving support to the surface) was not admissible as against the surface owner of lands situate in the other place,—the alleged usage or custom depending wholly upon acts of ownership. And in *Anglesey* (*Marquis*) v. *Hatherton* (*u*), it was said that, as a general rule, the customs of one manor can prove those of another manor, only where it is first shown that there has been a subinfeudation of the manors prior to the statute of *Quia Emptores*, —ALDERSON, B., observing, that the customs of manors were created by immemorial usage, and that there was no proof that the customs in question might not have originated after the one manor had parted from the other manor, if it ever belonged to that other manor.

(*q*) *Per* ROLFE, B., in *Anglesey* (*Marquis*) v. *Hatherton* (1842), 10 Mee. & W. 218, at p. 246.
(*r*) (1829), 8 B. & C. 758.
(*s*) (1739), 1 Str. 654.
(*t*) (1862), 1 Best & S. 940.
(*u*) (1842), 10 Mee. & W. 218 ; 12 L. J. (N.S.) Ex. 57.

Custom in respect of one mineral, —not, in general, proof as to any other mineral.

The somewhat similar question has arisen, viz., whether the custom which proves the right of the tenant to one kind of mineral proves his right also to another kind of mineral, or to the mines generally; and COWPER, L.C., considered that this question should (or might), under particular circumstances be answered in the affirmative (*x*). But the question will, in general, be answered in the negative; and, in fact, there may, in one and the same manor, be two customs,—one for the lord of the manor to have, *e.g.*, the tin, and another for the tenants to have, *e.g.*, the copper (*y*). Moreover, a custom being in derogation of the common law, and, therefore, to be strictly construed (*z*), it may be taken as settled, that the general right to the minerals remains vested in the lord, except so far as the custom extends to defeat (or lessen) his general right.

(*x*) *Winchester* (*Bishop*) v. *Knight* (1717), 1 P. Wms. 406.

(*y*) *Curtis* v. *Daniel* (1808), 10 East, 273.

(*z*) Bac. Abr. Customs, F.

CHAPTER IX.

ON MINING CO-PARTNERSHIPS AND MINING COMPANIES.

Co-Ownership and Co-Partnerships, Distinguished.

Co-ownerships and co-partnerships, distinguished.

The co-owners of a mine may or may not also be partners; and where, instead of demising the mine to working lessees, they work it themselves by their own workmen, the court is prone to find that they are partners, and to treat them accordingly,—at least so far as regards the profits arising from the mine. But the question of co-ownership or of co-partnership is entirely one of fact: Where the co-owners are partners in both the mine and in the profits of working it, the co-ownership is (in effect) merged in the partnership,—so that the rights and liabilities of the respective co-owners are regulated exclusively by the law of partnership; and conversely, where the co-owners are not partners at all either in the mines or in the profits, their rights and liabilities are regulated exclusively by the law of co-ownership; and, lastly, where the co-owners of the mine are co-partners in the profits only, their respective rights and liabilities are regulated,—as to the mine itself, by the law of co-ownership; and as to the profits, by the law of partnership.

When the mining operations are carried on by the co-owners under a co-partnership agreement, the parties will be intended to have entered into a trading adventure, and to have become co-partners in the ordinary sense of the word, not only as between themselves, but also as regards third persons. And in *Crawshay* v. *Maule* (*a*), where certain lands containing minerals had been held in co-ownership, and large quantities of iron and coal had been extracted from the mines, and extensive iron works had been erected upon the surface of the lands; and one of the co-owners commenced an action against the others for a dissolution of the partnership; and it appeared upon the evidence that the iron works had been conducted as a trading concern, not only the produce of the mines, but foreign iron and

(*a*) (1818), 1 Swanst. 495, at p. 523.

iron-ore, having been manufactured at the works,—Lord ELDON observed, that it was difficult to regard the case as that of mere co-owners of land ; and, in delivering final judgment, he said, that he entertained no doubt it was a trading concern and a partnership.

The mines may, however, be worked by the co-owners as such, and without any partnership agreement; and in such a case, the court will, in case of disagreement between them, appoint a receiver and manager of the mine (*b*),—equally as in the case of a partnership ; but otherwise the co-owners will not be partners.

PARTNERSHIPS, CONSTITUTION OF.

A mining partnership will arise by agreement (express or implied); and the agreement need not be in writing ; also, the terms and conditions of the agreement may be varied from time to time by the conduct of the partners (*c*).

The creditors entitled under a trust deed or deed of arrangement are not partners,—nor liable as such to third persons (*d*). Also, promoters are not partners (*e*); nor (in the general case) are provisional subscribers to a proposed partnership partners(*f*).

MINING COMPANIES UNDER COMPANIES ACTS,—CONSTITUTION OF.

Mining companies,—constitution of, under Companies Acts, 1862 to 1898.

Mines are very commonly owned and worked by companies registered under the Companies Acts, 1862 to 1898 (*g*). And by the Companies Act, 1862, it is provided generally, that all companies or partnerships having for their object the acquisition of gain, and consisting of more than twenty persons, if such companies have been established since the 1st day of November, 1862, *must* be registered under the Act ; and that any company consisting of seven or more persons associated for any lawful

(*b*) *Jeffery* v. *Smith* (1820), 1 Jac. & W. 301.

(*c*) *Smith* v. *Jeyes* (1841), 4 Beav. 503.

(*d*) *Hickman* v. *Cox* (1856), 18 Com. B. 638 ; 30 L. J. C. P. 125.

(*e*) *Doubleday* v. *Muskett* (1830), 4 Moo. & P. 750 ; *Attwood* v. *Small* (1827), 7 Barn & C. 390 ; *Higgins* v. *Hopkins* (1848), 3 Exch. 163 ; *Wilson* v. *Holden* (otherwise *Bailey* v. *Haines*) (1850), 15 Q. B. 533.

(*f*) *Dickinson* v. *Valpy* (1829), 10 B. & C. 128 ; *Fox* v. *Frith* (1842), 10 M. & W. 131.

(*g*) 25 & 26 Vict. c. 89 ; 30 & 31 Vict. c. 131 ; 33 & 34 Vict. c. 104 ; 40 & 41 Vict. c. 26 ; 42 & 43 Vict. c. 76 ; 43 Vict. c. 19 ; 46 & 47 Vict. c. 30 ; 49 Vict. c. 23 ; 53 & 54 Vict. cc. 62, 63, 64 ; 56 & 57 Vict. c. 58 ; and 61 & 62 Vict. c. 26.

purpose *may*, if established since the 1st November, 1862, be so registered,—and in either case, either with limited or with unlimited liability ; and if the liability of the company is limited, then the limitation of its liability may be either the amount (if any) unpaid on its shares (in which case the limit is said to be *by shares*), or such an amount as the members guarantee in the event of a winding up (in which case the limit is said to be *by guarantee*).

DIRECTORS.

Directors,—powers of.

The business of the company is managed by the directors ; and the directors may exercise all such powers of the company as are not contrary to the provisions of the Companies Act, 1862, —subject (as between themselves and the company) to their compliance with the provisions contained in the articles of association of the company. Therefore,—Firstly, if the acts of the directors are *intra vires* the company, then these acts bind the company in all cases in which the directors have strictly pursued their authority as directors ; and where the directors have not strictly pursued, or have exceeded, their authority as directors, even in these cases the company is bound *towards strangers contracting bonâ fide with the directors*. But, Secondly, if the acts of the directors are *ultra vires* the company, then these acts do not bind the company. And, subject to that distinction, the question how far directors bind the company, is answered in precisely the same way as the question how far any ordinary general agent binds his principal.

Directors,—liability of.

But the directors of the company fill a double character, —being (1) Agents of the company, and (2) Trustees for the shareholders. And in their character of agents, their personal liability upon contracts made by them, is governed by the ordinary law of principal and agent ; and they cannot therefore be sued as personally liable on the contracts they have entered into,—*scil.*, because it is not the agent, but the principal, that is the true contracting party. But in their character of trustees, any shareholder in the company may sue the directors personally, where he charges them as trustees,—*scil.*, because in such a case, the allegation is, that the company has done no wrong whatever, but that the directorate has committed the wrong, and the shareholder sues in order to protect the company against the unlawful acts of the directorate (*h*); but the court

(*h*) *Ferguson* v. *Wilson* (1866), L. R. 2 Ch. App. 77.

will not, in general, hold the directors personally liable for a mere error of judgment (*i*).

SHAREHOLDERS OR MEMBERS.

Shareholder's right of transfer.

It is the characteristic feature of every such registered company, that the ordinary incident of partnership in respect of the non-introduction of new members is excluded,—the shares being freely transferable subject only to the conditions (if any) imposed by the articles of association of the company in respect of the conditions on which a transfer may be effected ; and excepting as so restrained, the shareholders have the right of going into the market and disposing of and transferring their shares without the consent of the directors or shareholders, or anybody,—provided only the transfer is a *bonâ fide* out-and-out disposal of the property. And if it is desired by any such company that such unlimited right of transfer shall not exist, a clause must be inserted in the articles giving to the directors the power of rejecting proposed transferees ; and in the absence of any such provision, the directors have no discretionary power of refusing to register a *bonâ fide* transfer (*k*),—*scil.*, to a transferee who is legally competent to take the shares (*l*). Moreover, in respect of his right of dealing with his shares, a director is, in general, as free as any other shareholder,—not being, as regards his own shares, in the position of a trustee for the general body of the shareholders, except, perhaps, as regards his qualification shares (*m*) (if any),—for these latter shares he cannot, in general, deal with, without giving up his directorship (*n*) ; and a director may also surrender his own shares under a power in the articles authorising surrenders by shareholders (*o*).

Where the shareholder is also a director.

Discretion as to rejection of transferees.

Where a power of rejecting proposed transferees is reserved to the directors, they must exercise it reasonably (*p*), and will be controlled by the court against any unreasonable exercise of the power (*q*).

(*i*) *Re Brighton Brewery Co., Hunt's Case* (1868), 37 L. J. Ch. 278, 280.
(*k*) *Weston's Case* (1868), L. R. 4 Ch. App. 20 ; *Gilbert's Case* (1870), L. R. 5 Ch. App. 559, 565.
(*l*) *Lumsden's Case* (1868), L. R. 4 Ch. App. 31, 34.
(*m*) *Cumming* v. *Prescott* (1837), 2 Y. & C. Exch. 488.
(*n*) *Gilbert's Case* (1870), L. R. 5 Ch. App. 559.
(*o*) *Snell's Case* (1869), L. R. 5 Ch. App. 22.
(*p*) *Poole* v. *Middleton* (1861), 29 Beav. 646, 651.
(*q*) *Nation's Case* (1866), L. R. 3 Eq. 77.

COST-BOOK MINING COMPANIES,—CONSTITUTION AND CHARACTER OF.

Cost-book mining companies,—constitution and character of.

Mines are also sometimes owned and worked, and especially in the counties of Cornwall and Devon, by associations of adventurers,—and which associations (called cost-book companies) are an irregular variety of partnership (*r*). And according to the cost-book system, the mine is vested in one or more of the proprietors, in implied trust for the rest, and is divided into shares among all,—an agent being appointed to manage the mine. This agent (who is called the *purser*) keeps the cost book ; and he enters therein all the minutes of meetings, the profits and expenses of the mine, the names of the shareholders, the accounts of their respective interests and liabilities, and the transfers of their shares. Meetings of the owners are, in general, held once every two months ; and those present at the meeting consider the accounts and reports of the agent, and exercise a general control over the affairs of the mine, all questions in case of difference being decided by a majority. Any shareholder is allowed to retire by giving notice in writing to the purser, and by settling his account ; and the transfer of a share is usually effected by substituting one name for another, on the production of a proper authority in writing from the transferor ; and a mere entry in the book of the purser completes the transfer,—no consent of the other proprietors being required to the transfer.

The cost-book system prevails also, to a limited extent, in other parts of England, more particularly in the north, but by adoption only (*s*).

STANNARIES ACT, 1869,—PROVISIONS OF.

Stannaries Act, 1869,—provisions of.

By the Stannaries Act, 1869 (*t*), the law relating to mining partnership within the stannaries of Devon and Cornwall, that is to say, the cost-book system of mining in those two counties, has been declared in a more definite manner, and has also been in some respects amended ; but the Act has no application beyond these two counties, or beyond the mines therein that are subject to the jurisdiction of the stannary court, or (now)

(*r*) *In re Bodmin United Mines Co.* (1857), 23 Beav. 370 ; 3 Jur. (N.S.) 350.

(*s*) *Geake* v. *Jackson* (1867), 36 L. J. C. P. 108 ; *Clarke* v. *Hart* (1858), 6 H. L. Cas. 633.

(*t*) 32 & 33 Vict. c. 19.

of the county court in which the jurisdiction of that court has been merged (*u*).

The more important provisions of the Act are to the following effect :—

(1) As to accounts.

The purser of every company shall, once at least in every four months (*i.e.*, sixteen weeks) (*x*), truly enter in the cost book of the company accounts showing the actual financial position of the company at the end either of the financial month of the company last preceding the time of entry, or of the calendar month last preceding that time, including a statement of all credits, debts, and liabilities, and distinguishing in such accounts the amount of calls paid and calls not paid, and also all other accounts, documents, and things which the purser is for the time being required to enter therein by the custom of the stannaries, or by the directions of the company ; and for neglect, the purser incurs a penalty not exceeding 20*l.* (*y*), and for a false entry a penalty of 50*l.* (*z*).

(2) As to calls.

A call may be made for the purpose of defraying the whole or any portion of the estimated expenses to be incurred at any time within three months after the date of the meeting at which the call is made (s. 11) ; and at the time of making the call, the company may direct, that discount not exceeding five per cent. shall be allowed to every shareholder on payment of the call, at or within the time appointed for payment thereof ; and may direct that interest at the rate of 5*l.* per centum per annum shall be charged on all amounts due on account of a call, and remaining unpaid after one month from the time appointed for the payment thereof (s. 12). And the amount for the time being unpaid of any call is deemed to be a debt due from the shareholder to the company ; and if at the time appointed by the company for the payment of any such call any shareholder shall fail to pay the amount thereof, it shall be lawful for the company to sue any such shareholder for the amount of such call, in any court of law having competent jurisdiction, and to recover the amount of such call, together with interest for the same and costs of suit. And in any action to be brought by the company to recover the amount of such call, it shall be sufficient in the declaration or other proceeding in the said action to state that the defendant,—or (in case of such

And as to enforcing payment.

(*u*) 59 & 60 Vict. c. 45.
(*x*) 50 & 51 Vict. c. 43, s. 23.
(*y*) *Ibid.*
(*z*) 50 & 51 Vict. c. 43, s. 24.

action being brought against the legal personal representative of a deceased shareholder) that the deceased shareholder,—was at the time of such call being made the holder of one share or more in the company (*stating the number of shares*), and that the defendant,—or (in case of the death of a shareholder as aforesaid) that the defendant or defendants, as executor or administrator or executors or administrators of such deceased shareholder,—is or are indebted to the company in the sum of money to which the calls in arrear and interest shall amount, in respect of one call or more upon one share or more (*stating the number and amount of each of such calls*) ; and on the trial or hearing of such action it shall be sufficient to prove, as a *primâ facie* case on the part of the plaintiff, that the defendant or such deceased shareholder at the time of making such call was a holder of such one share or more (as may be) in the company, and that such call was duly made ; and it shall not be necessary to prove the appointment or authority of the persons who made such call (s. 13) (*a*).

(3) As to the transfer of shares.

Section 14 enables the company to refuse to recognise a transfer, unless all calls made in respect of the share or shares purporting to be transferred, with interest and expenses, have been paid ; and s. 15 authorises the company to refuse to recognise the transfer of any fraction of a share.

(4) As to the forfeiture of shares.

If a call has been made and it remains unpaid on the day appointed for payment, the company may, pending the default of payment, serve a notice upon the defaulter requiring payment, with interest and expenses ; and, failing payment, the share will become liable to forfeiture (s. 16) ; and upon continued failure to pay, the share is forfeited by resolution at a meeting of which a seven days' notice specifying the object of the meeting has been given (s. 17) ; and the share so forfeited becomes the property of the company (s. 18) ; but the forfeiture does not relieve the defaulter from payment of the call which he has failed to pay, or the interest and expenses accrued thereon (s. 20).

(5) As to the relinquishment of shares.

A share may be relinquished by notice in writing to the purser (s. 22), and thereupon becomes the property of the company (s. 21) ; but the company need not recognise the relinquishment of the fraction of a share (s. 22) ; and no

(*a*) These suits used to be in the name of the purser suing as a representative of the company, but pursers' suits are now abolished (59 & 60 Vict. c. 45, and Rules of February, 1897, r. 5).

relinquishment is permitted to be good which is made within six weeks before the winding-up of the company (*b*).

SALES AND AMALGAMATIONS OF COST-BOOK MINES.

Sale of mine, etc., as a going concern.

Without prejudice to the landlords, lessors, or others having any estate, charge on, or interest in, the land in which the mine is situate, or to the creditors, and their customary lien on the saleable machinery and materials belonging to the company,—the company has power, by a special resolution to which three-fourths in value of the shareholders consent (either in writing or at a meeting), to sell and dispose of the machinery and materials belonging to the company, with or without the legal or equitable interest of the company in the lease or sett on which any mine belonging to the company is worked, as a going concern ; provided that every such sale shall be by public auction, and that due notice of the intended sale be given by public advertisement in some local newspaper, and in some public journal or newspaper specially relating to mining companies, for two successive weeks before the sale (s. 24).

Adjoining mines,—amalgamation of.

And as regards amalgamations, the 50 & 51 Vict. c. 43, s. 27, has provided, that when the limits of any mine join those of any other mine, the companies respectively working the said mines may, with the consent in writing of the respective lessors thereof in all cases where such consent is by law or custom necessary, amalgamate and become one company,—provided that no such amalgamation shall take place, unless each of the said companies shall authorise the same by a special resolution, to which two-thirds in value of the shareholders in the said company shall consent in writing ; and such resolution is to be registered in the court, and the amalgamation is not to take effect until such registration, and is to be advertised in such manner as the court directs.

FORFEITURES AND RELINQUISHMENTS.

It was held in *Hayter* v. *Tucker* (*c*), that shares in a cost-book mine are not within the Statute of Mortmain (9 Geo. 2, c. 36) ; and it was held in *Hybart* v. *Parker* (*d*), prior to the Stannaries Act, 1869, that unpaid calls could not be made recoverable

(*b*) 50 & 51 Vict. c. 43, s. 22.
(*c*) (1857), 4 K. & J. 243.
(*d*) (1858), 4 C. B. (N.S.) 209.

as a debt; and it was held in *Clarke* v. *Hart* (*e*), prior to the same Act, that a power in co-adventurers to forfeit the shares of one of their number for non-payment of calls was not necessarily incident to a cost-book mining adventure,—although, by special agreement, the right of forfeiture might be given. And where the power to forfeit exists by agreement, the exercise of the power is *strictissimi juris*, and the forms to be observed in declaring the forfeiture require therefore to be strictly pursued.

A shareholder in a cost-book mine who has relinquished his shares and has paid his due proportion of the expenses up to the date of relinquishment, is entitled by the custom to be paid his share of the then value of the stock and plant of the mine; and such share is due to him immediately, and is payable within two years; and the value is to be ascertained upon the basis of all the continuing shareholders having at the same time relinquished their shares (*f*); and the actually relinquishing shareholder is entitled to prove for such value as a debt and in competition with the other creditors of the company (*g*).

RE-ADMISSIONS.

Re-admission of shareholders,—after forfeiture or relinquishment of their shares.

As regards the partners in (or members of) a cost-book mining partnership (or joint stock mining company),—if calls are made, and the shares of the defaulters are forfeited, the defaulters cannot, in general, come forward afterwards (say, after five or ten years) when the mining adventure has become prosperous, and claim to be partners (or members), and to be (in effect) re-admitted as such (*h*),—but they will be taken to have abandoned their rights, and that whether the forfeiture is effective or not. At the same time, if the forfeiture is doubtful in itself, and its validity is specifically disputed at the time, and the defaulters insist continuously on their rights,—and especially if the full period has not run which is required by the statutes of limitation for the extinguishment of the defaulters' rights,—they may apparently come forward, and claim to be (in effect) re-admitted as partners (or as members),—doing, of course, what is equitable under all the circumstances, and in

(*e*) (1858), 6 H. L. Cas. 633.
(*f*) 50 & 51 Vict. c. 43, s. 21.
(*g*) *In re Prosper United Mining Co., Ex parte Palmer* (1872), L. R. 7 Ch. App. 286.
(*h*) *Norway* v. *Rowe* (1812), 19 Ves. 144; *Prendergast* v. *Turton* (1841), 1 Y. & C. Ch. 98; *Rule* v. *Jewell* (1881), 18 Ch. D. 660.

particular paying up the arrears due and unpaid on the calls, and contributing also their fair share of the other expenses (if any) incurred in rendering the mining adventure a prosperous one (*i*).

BANKRUPT MEMBERS.

Bankrupt member,—purchase of share of.

A mining partner cannot (nor can any other partner) stipulate in the partnership deed to give his co-partners the exclusive benefit of the mining lease, in the event of his bankruptcy,—for that would be to defeat the claims of the trustee in his bankruptcy; but such a provision will otherwise be valid enough, that is to say, so as to bind the partner and his estate (*k*); and it is, in general, made a term of this provision, that the share of the partner in the lease (and in other the partnership assets) shall be taken at a valuation.

DECEASED MEMBERS.

Share of partner,—nature of, and devolution of.

The share of a partner in the property and assets of the partnership,—including even the lands and mines of the partnership,—is personal (and not real) estate, and devolves upon his legal personal representatives on his death in trust for his next of kin or other the beneficiaries entitled under his will; and the lands and mines require therefore to be sold, and the sale proceeds divided (*l*),—the incident of survivorship being, of course, excluded (*m*).

RENEWALS OF PARTNERSHIP LEASES.

Renewed lease,—where partnership property.

Each partner is, in general, in a fiduciary relation towards his co-partners; and therefore where one partner obtains in his own name and for his own purported benefit a new lease of the partnership mines,—intending to exclude the other partners from sharing in the benefits of the renewal, he will, in the general case, be declared a trustee of it for all the partners. Thus, in *Featherstonhaugh* v. *Fenwick* (*n*), where the plaintiff and the defendant had been partners at will in the manufacture of glass, and in a freestone quarry,—the defendant's son having been afterwards admitted into the partnership; and the father and the son, having obtained a renewal of the lease

(*i*) *Clarke* v. *Hart* (1858), 6 H. L Cas. 633; *Hart* v. *Clarke* (1854), 6 De G. M. & G. 232.

(*k*) *Whitmore* v. *Mason* (1861), 2 Johns. & H. 204; 31 L. J. Ch. 433.

(*l*) *Crawshay* v. *Maule* (1818), 1 Sw. 521.

(*m*) *Buckley* v. *Barber* (1851), 6 Exch. 164.

(*n*) (1811), 17 Ves. 298.

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CO-PARTNERSHIPS AND MINING COMPANIES.

in their own names only and without communicating the fact to the plaintiff, on the same day gave him notice of their intention to dissolve the partnership,—Sir WILLIAM GRANT, M.R., said that one partner could not treat privately, and behind the back of his co-partner, for a lease of the partnership premises for his own individual benefit; and he declared the defendants trustees of the renewed lease in trust for the partnership. And the like decision was given in *Clegg* v. *Fishwick* (*o*), under circumstances comparatively the same,—although it was stated that the lessor had refused to grant any renewal of the lease to the partnership, and had in fact refused to treat with the defendants except for an exclusive grant to themselves.

Delay,—effect of.

In *Clegg* v. *Edmondson* (*p*), where the plaintiffs and defendants were partners in a colliery,—the partnership having become a partnership at will,—and the defendants were the managing partners, and they gave notice to dissolve,—and at (or about) the same time, they intimated that as the old mining leases of the partnership were run out or expiring, they would obtain a new lease of the partnership mines for their own benefit, and to the exclusion of the plaintiffs; and they afterwards obtained such new lease, and thereafter carried on the colliery in partnership as between themselves, denying that the plaintiff had any continuing rights in the new lease or in the new partnership,—The court was of opinion, following in this respect the previous decision in *Clegg* v. *Fishwick* (*q*), which had followed *Featherstonhaugh* v. *Fenwick* (*r*), that the defendant's contention was contrary to equity, although there had been nothing clandestine in their obtaining the new lease. But it appearing that the plaintiffs had for eight years neglected to assert their rights by action,—having for all that time contented themselves with mere protests and claims of their rights,—the court held that the plaintiffs were by their own conduct barred of all title to relief,—and this decree proceeded partly upon the nature of the property (which was in the nature of a trading business, and involved both risk and outlay), and partly upon the nature of the plaintiff's claim (which was purely an equitable right, or right in the nature of a constructive trust, any delay in the assertion of which was dangerous, and a lengthened delay was fatal). And note, that if the plaintiffs' right had been a legal

(*o*) (1849), 19 L. J. (N.S.) Ch. 49; 294.
(*p*) (1857), 8 De G. M. & G. 787.
(*q*) (1849), 1 Mac. & G. 294.
(*r*) (1811) 17 Ves. 298.

right,—*e.g.*, if they had been co-lessees in the new lease,—the delay (not amounting to evidence of a release or abandonment of their rights) (*s*) would not have mattered,—*scil.*, assuming that the period of the delay was not such as to operate as a legal bar by the statutes of limitation (*t*); and the court will not presume any release or abandonment, where the plaintiffs have been kept in ignorance of their rights (*u*).

Lien for share of expenditure.

But, of course, where one of the partners is the exclusive owner of the mining lease, and the partnership is only in the profits of working the mine, any renewal of the lease obtained by him in his own name will be for his own benefit, equally as the original lease was. Therefore, where a lessee was entitled to two seams of coal, called respectively the upper and the lower seam; and he took his colliery agent or viewer into partnership for the purpose of working the upper seam as a distinct concern; and about three years afterwards, the lessee procured a renewal of the lease in his own name,—the partnership continuing thereafter as before, and both partners incurring a large expenditure, not only in works for the upper seam, but also in sinking a pit for other coal; and the lessee filed a bill for dissolution, and claimed the exclusive benefit of the renewed lease,—The court held, that the lease did not form part of the partnership property, but belonged exclusively to the lessee,—subject, however, to this, namely, and the court expressly declared, that the defendant was entitled to an allowance for the expenditure in sinking the new pit, which was for the benefit of the lessee-partner, and who was considered to have had sufficient knowledge of the expenditure and of its purpose (*x*).

SPECIAL AGREEMENTS BETWEEN PARTNERS.

Restrictive provisions,—validity of, as between the partners themselves;

As regards the liabilities generally, and the powers and duties generally, of mining partners, that is a branch of the general law of partnership; and according to the general law, each partner is agent for himself and co-partners,—*scil.*, in all partnership matters. It is usual, however, in partnership agreements, to introduce special provisions restrictive of the power of the individual partners; and these restrictive provisions are, of

(*s*) *Prendergast* v. *Turton* (1841), 1 Mac. & G. 26 L. J. Ch. 673.

(*t*) *Hart* v. *Clarke* (1854), 6 De G. M. & G. 232; *Clarke* v. *Hart* (1858), 6 H. L. Cas. 633.

(*u*) *Clements* v. *Hall* (1857), 24 Beav. 333; 2 De G. & J. 173; 27 L. J. Ch. 349.

(*x*) *Burdon v. Barkas* (1861), 3 Giff. 412; 31 L. J. Ch. 521.

As affected by the usage of the locality.

course, binding on all the partners *inter se* (*y*), although they may not operate to bind third persons not having notice of them (*z*). The general usage also which may prevail in the particular branch of industry in which the partnership is engaged is a very important consideration, and in mining businesses more especially; and that usage also varies in the different mining districts (*a*).

POWERS OF MANAGING PARTNER AND OF MANAGER.

Drawing bills.

It appears to be well settled, that mining partners cannot, apart from usage or express power in that behalf conferred by the articles, bind each other by drawing or accepting bills of exchange or by giving promissory notes (*b*); but if the money can be shown to have been applied for the legitimate purposes of the company, then the company may be liable as for money paid to its use,—at least, for the purpose of entitling the partner or director who has signed the bill or note to be indemnified out of the assets of the partnership or company (*c*).

Borrowing money.

It appears to be also well settled, that a mining agent or director cannot, without the specific authority of the company, borrow money, even for the most urgent occasions of the mine (*d*); and the authority to borrow, where it exists, whether by usage or by an express clause in the articles, must be proved (*e*); and such authority must also be specific and not inferential (*f*); but for money borrowed and which has been duly applied for the ordinary and necessary occasions of the mine, the company may be held liable (*g*). The right to incur debts for goods supplied for the mine cannot, however, be restrained, as against a creditor, by any private stipulation between the partners,—for, as TURNER, L.J., observed in *In re German Mining Co.* (*h*), there is a distinction between monies borrowed and debts contracted; and while it is not according

(*y*) *Ridley* v. *Plymouth, etc. Grinding Co.* (1848), 2 Exch. 711.

(*z*) *South Carolina Bank* v. *Case* (1828), 8 B. & C. 427.

(*a*) *Duncan* v. *Lowndes* (1813), 3 Camp. 478.

(*b*) *Greenslade* v. *Dower* (1828), 7 B. & C. 635.

(*c*) *Brown* v. *Kidger* (1858), 3 H. & N. 853; *In re German Mining Co.* (1853), 4 De G. M. & G. 19.

(*d*) *Hawtayne* v. *Bourne* (1841), 7 M. & W. 595; 9 L. J. (N.S.) Exch. 224; *Sims* v. *Brittain* (1832), 4 Barn. & Ad. 375.

(*e*) *Ricketts* v. *Bennett* (1847), 4 Com. B. Rep. 686; 17 L. J. (N.S.) C. P. 17.

(*f*) *Burmester* v. *Norris* (1851), 21 L. J. (N.S.) Exch. 43; and see *Yorkshire Rail. Wagon Co.* v. *Maclure* (1881), 19 Ch. D. 478, at p. 488.

(*g*) *Tredwen* v. *Bourne* (1840), 6 M. & W. 461; 9 L. J. (N.S.) Exch. 290.

(*h*) (1853), 22 L. J. (N.S.) Ch. 41, 926.

to the usual course of business to borrow money,—and therefore, the lender must look to the power of borrowing,—*scil.*, because it would be unjust to make the shareholders liable whether the loans were expended on the mine or not,—still there was no injustice in making them liable for wages and debts of which they had derived the benefit.

Managing partner,—powers of.

The managing partner in a mine or the manager of the mine is the delegate representative of all and can bind all, nor may his general powers be limited (*scil.*, as against a creditor) by any private stipulation between him and the other co-partners or the company (*i*) ; but a partner who is not entitled to interfere in the management of the partnership business, or anyone who is a mere passive shareholder, has no power whatever to bind the company or his co-partners (*k*) ; and subject to that distinction, any of the co-partners can purchase or sell goods for the partnership or otherwise bind the partnership (*l*).

LIABILITIES OF INDIVIDUAL PARTNERS.

Liabilities of the individual partners.

A partner will not in general be liable for any debts contracted by the firm before his connection with it (*m*) ; but a retiring partner will, in general, continue to be liable for debts contracted subsequently to his retirement (*n*), unless and until he give due notice of his retirement,—either by advertisement in the Gazette (with respect to all parties who have not previously dealt with the firm) (*o*), or by express notice (with respect to the old customers of the firm) (*p*) ; but a dormant partner need not give notice of his retirement (*q*).

A partner or shareholder will also, in general, escape all liability for the future engagements of the partnership or company, if he make a valid assignment or transfer of his share (*r*),—assuming, of course, that the transfer is *bonâ fide*, and not merely colourable (*s*) ; and when the transfer is *bonâ fide* and is absolute, it is not material that the transferee knew

(*i*) *Houghton* v. *Mathews* (1803), 3 B. & P. 489.
(*k*) *Ricketts* v. *Bennett* (1847), 4 C. B. 686.
(*l*) *Reid* v. *Hollinshead* (1825), 4 B. & C. 867.
(*m*) *Shirreff* v. *Wilks* (1800), 1 East, 48.
(*n*) *Parkin* v. *Carruthers* (1801), 3 Esp. 248.
(*o*) *Godfrey* v. *Turnbull* (1795), 1 Esp. 371.
(*p*) *M'Iver* v. *Humble* (1812), 16 East, 169.
(*q*) *Carter* v. *Whalley* (1830), 1 Barn. & Ad. 11.
(*r*) *Taylor* v. *Shum* (1797), 1 B. & P. 21.
(*s*) *Ex parte Budd* (1861), 31 L. J. Ch. 4 ; *Cox's Case* (1863), 33 L. J. Ch. 145.

the company to be in difficulties (*t*), or that he actually paid money for the transfer to the transferee (*u*).

UBERRIMA FIDES, AS BETWEEN PARTNERS.

Necessity of *uberrima fides*,—between partners.

It is unnecessary to say much upon the general duties of a partner, that is to say, regarding the duties which arise out of the mutual confidence of each partner in the other and others; but the contract of partnership is one of *uberrima fides*; and therefore no partner is allowed to put himself in a situation which may give him even a *bias* in the discharge of his duty (*x*); and the managing partner of a mine is under a duty towards his co-partners to avoid, *e.g.*, trespassing into the adjoining mine.

Mining trespass, culpably persisted in, by managing partner,—liability for.

And if judgment for the damages in respect of such trespass is recovered against him, and he personally satisfies that judgment, he may or may not be entitled to contribution from his co-partners in respect of that judgment debt,—that is to say, he will, in the general case, be entitled to contribution; but if the trespass was culpably negligent on his part, and was recklessly persisted in after warning from the adjoining owner, and especially if the co-partners were kept in ignorance of the trespass until the action for the damages was commenced, he will not be entitled to contribution (*y*).

UBERRIMA FIDES, AS BETWEEN COMPANY AND SHAREHOLDERS.

Prospectus of company,—contracts to be disclosed in.

The principle of *uberrima fides* as between partners,—a principle which has been enforced in innumerable instances by courts of equity (*a*),—has been recognised also in the Companies Acts, 1862 and 1867,—s. 38 of the latter of these two Acts enacting that every prospectus of a company, and every notice inviting persons to subscribe for shares in the company, shall specify all the contracts entered into by the company, or by the promoters, directors, or trustees thereof, before the issue of such prospectus or notice,—failing which, the prospectus or notice is deemed fraudulent as regards any person taking shares in the

(*t*) *Ex parte De Pass* (1859), 4 De G. & J. 544; 28 L. J. Ch. 769.
(*u*) *In re The Hafod Lead Mining Co.* (1866), 35 L. J. Ch. 304.
(*x*) *Chaplin* v. *Clarke* (1849), 4 Exch. 403.
(*y*) *Thomas* v. *Atherton* (1878), 10 Ch. D. 185.
(*a*) *In re Caerphilly Colliery Co.* (1877), 5 Ch. D. 336; *Morvale Consols Tin Mining Co.* (1875), 2 Ch. D. 1; *Cornell* v. *Hay* (1873), L. R. 8 C. P. 328, 334.

company on the faith of such prospectus. But the language of the section, although wide enough to include every contract, applies only to contracts relating to the affairs of the company, and being contracts of a character which would influence an intending shareholder in forming his judgment upon the character, position, and prospects of the company. Therefore, contracts, whereby promoters agree to provide the directors with their qualifications, or to pay a trustee for the company a salary, or to appoint a certain person managing director on certain terms, or to pay to the vendor of property to be purchased by the company a sum much less than the purchase-money payable by the company, and to retain the residue,—all such contracts, remaining undisclosed,—are fraudulent within the section (*b*),—the fraud being, of course, upon the shareholders (*c*).

In *Twycross* v. *Grant* (*d*), COLERIDGE, L.C.J., said of s. 38, that the enactment, being one passed to prevent fraud, and being couched in general language, ought to be construed so as to defeat all the frauds which were within the mischief sought to be remedied ; and the general language of the statute ought not to be cut down so as to leave, perhaps, the larger portion of such frauds entirely undefeated: and the words of the Act were purposely left as general as possible, in order to throw as wide a protection as possible over those for whose benefit the Act was passed (*scil.*, the shareholders).

Fully paid up shares,—contract for issue of, to be registered.

Also, under the Companies Act, 1862, s. 25, where shares are issued as fully paid up,—and they have in fact been fully paid for, but for some consideration other than cash,—the agreement under which the shares are so issued must have been previously registered ; but the prior non-registration of the contract, where it is attributable to inadvertence (as distinguished from fraud), is now relievable against,—or generally where the circumstances are such as (in the opinion of the court) entitle the party to such relief (*e*).

LEGAL REMEDIES AS BETWEEN PARTNERS.

Legal remedies, in partnership cases.

One partner cannot sue his co-partner for work and labour or services rendered, or for money expended on account of the

(*b*) *Charlton* v. *Hay* (1874), 31 L. T. 437 ; 23 W. R. 129.

(*c*) *Cornell* v. *Hay* (1873), L. R. 8 C. P. 328 ; and distinguish *Craig* v. *Phillips* (1876), 3 Ch. D. 722.

(*d*) (1877), 2 C. P. D. 469.

(*e*) 61 & 62 Vict. c. 26.

partnership,—the recompense (if any) and the repayment depending in such cases on the provisions (if any) applicable thereto contained in the partnership articles ; but for a balance found due upon a settlement of accounts, one partner may sue his co-partner, as he may also do in respect of any other debt which is sufficiently distinct and separate from the general partnership liabilities (*f*).

It follows, that one member of a trading company cannot sue another for goods sold and delivered to the defendant as a member of the trading company ; but, of course, if goods are supplied by a company to an individual member, for his private use, the company may sue him for goods sold and delivered ; also, the company may, by force of statute, sue any of its members, as, *e.g.*, for calls in arrear (*g*),—although it could not, by the common law, have done so (*h*).

EQUITABLE REMEDIES AS BETWEEN PARTNERS.

Equitable remedies,—in partnership cases.

The legal remedies of partners *inter se* are mostly of an equitable character,—being, in general, either for accounts or for a dissolution, or for accounts and a dissolution, or for some relief incidental to the account or to the dissolution ; and there is also, of course, the remedy for the specific enforcement of the partnership agreement or of some particular clause or clauses of that agreement. The principal remedies are therefore three, namely, accounts, dissolution, and specific performance ; and the incidental remedies are two, namely, a receiver (or receiver and manager) and an injunction.

(1) ACCOUNT.

(1) Account.

Firstly, the remedy of Account. This remedy is invariably part of the relief granted where the judgment is for a dissolution ; and it is, in fact, only in exceptional cases that an account will be directed without a dissolution,—at least, in the case of partnerships generally (*i*). However, as regards mining partnerships, Lord ABINGER was of opinion in *Bentley* v. *Bates* (*k*), that the account should be directed without any

(*f*) *Sedgwick* v. *Daniell* (1857), 2 H. & N. 319 ; 27 L. J. Exch. 116.
(*g*) Companies Act, 1862, s. 16.
(*h*) *Hybart* v. *Parker* (1858), 4 C. B. (N.S.) 209.
(*i*) *Marshall* v. *Colman* (1820), 2 Jac. & W. 266 ; *Knowles* v. *Haughton* (1805), 11 Ves. 168 ; *Loscombe* v. *Russell* (1830), 4 Sim. 8.
(*k*) (1840), 4 You. & C. 182 ; 9 L. J. (N.S.) Exch. Eq. 30.

dissolution,—*scil.*, because it would be hard, that partners should be obliged to put an end to all their interests before they were able to bring one another to account, and especially so in the case of lessees of a colliery. And it appears, that if the parties are not mere commercial traders, but are tenants in common, and are merely enjoying the profits of their land, an account may always be had without a dissolution (*l*). Also, where the defendant is forcing a dissolution, the plaintiff is not compellable to accept a dissolution, but may have an account without a dissolution (*m*).

Where, however, there is a mere trading partnership, and a colliery (or some share therein) is acquired as a partnership asset, there must, *semble*, be a dissolution, if there is to be an account ; and that was the opinion of Lord ELDON (*n*), and (at a later date) of Lord HATHERLEY (*o*).

(2) DISSOLUTION.

(2) Dissolution.

Secondly, the remedy of Dissolution. Partnerships in mines were treated by Lord ELDON in *Crawshay* v. *Maule* (*p*), as being like ordinary partnerships, and subject to the ordinary rules with regard to their dissolution,—the reason being, of course, the *delectus personæ*, or right of each partner in the choice of a new co-partner. Death, therefore, is a determination of the partnership, and notice of the death is no more than notice of the fact that death has determined it ; and considering what persons death might introduce into the partnership, unless it worked a dissolution, there was strong reason for holding that death was a determination of the relationship. For was the surviving partner to receive into the partnership, at all hazards, the executor or administrator of the deceased, or his next of kin, or possibly a creditor taking out administration, or anyone else (whoever it might be) who claimed by representation or by assignment from the representative ?

Assignment by partner,—effect of.

So, also, an assignment by one partner of his share will produce a dissolution of the partnership,—the maxim of the civil law, *Cum aliquis renunciaverit societati, solvitur societas*, being

(*l*) *Bentley* v. *Bates* (1840), 4 You. & C. 182 ; 9 L. J. (N.S.) Exch. Eq. 30.
(*m*) *Fairthorne* v. *Weston* (1844), 3 Hare, 387 ; 13 L. J. (N.S.) Ch. 263.
(*n*) *Forman* v. *Homfray* (1813), 2 Ves. & B. 329 ; *Marshall* v. *Colman* (1820), 2 Jac. & W. 266.
(*o*) *Roberts* v. *Eberhardt* (1853), Kay, 148.
(*p*) (1818), 1 Swanst. 521 ; Wils. 181.

applicable to the English law of partnership ; and this result also proceeds from, or is founded upon, the *delectus personæ*. And no person, therefore, can introduce another into the partnership without the agreement of the other partners,—unless, of course, by the original constitution of the partnership, it has been otherwise provided,—either by express agreement (as in cases regulated by articles of partnership) or by notorious usage and consistent practice (as in cost-book mining companies). Where there is the right to assign, the assignor upon making a perfect legal assignment, ceases to be a partner (*q*) ; and that will be so, whether his assignee is a solvent and responsible person or not (*r*).

Death of partner,—effect of.

And as regards dissolutions by death, it is very usual, in the partnership articles, to stipulate that the partnership shall still subsist, notwithstanding the death ; and the like provisions may be made to meet all (or almost all) other causes of its dissolution. Thus, *e.g.*, the term of the partnership may be made to endure for a definite number of years, undeterminable either at the will of the parties or by death or assignment.

The like stipulation may sometimes be implied also from the nature of the interests which are vested in the partners ; but that will not ordinarily be so. Thus, in *Crawshay* v. *Maule* (*s*), where the testator, Richard Crawshay, was possessed of mines and ironworks under three leases for ninety-nine years each, at an annual rent ; and by his will, he appointed B. Hall his executor ; and by the combined effect of his will and of a codicil thereto, he gave to his son (the plaintiff) three-eighth shares in the mines and ironworks, and to B. Hall three-eighths, and to Joseph Bayley two-eighths ; and these three persons afterwards for some time carried on the works in co-partnership ; and the plaintiff then purchased the two-eighth shares of Bayley ; and thereafter the concern was carried on by the plaintiff and B. Hall in co-partnership ; and then Hall died (the leases being still subsisting), and by his will he gave directions to his trustees with regard to carrying on or discontinuing the works, —but the plaintiff claimed that by the death of Hall the partnership was dissolved, and he prayed an account and sale of the property, and a division of the proceeds,—Lord ELDON

Partnership leases, duration of,—no inference from, as to duration of partnership.

(*q*) *Ex parte Fenn* (1853), 22 L. J. (N.S.) Ch. 692.

(*r*) *Jefferys* v. *Smith* (1826), 3 Russ. 158.

(*s*) (1818), 1 Swanst. 495.

fully admitted, that if the testator and owner of the property had thought proper, by his will, to direct that his legatees should continue the partnership as long as the longest of the leases should endure, no person claiming under the will could have taken the benefits conferred by it, without submitting to the inconveniences which it imposed; but in the absence of any such express or implied direction, he would be contradicting all authority if he said that, wherever there was a partnership, the purchase of a leasehold interest of longer or shorter duration was a circumstance from which it was to be inferred that the partnership should continue as long as the lease; and, in fact, there was no general rule, that partners purchasing a leasehold interest must be understood to have entered into a contract of partnership commensurate with the duration of the lease,—the purchase of a lease being no more than the purchase of an article of stock, which, when the partnership was dissolved, would require to be sold. And in *Laycock* v. *Bulmer* (*t*), where several partners purchased an estate, and took a lease from the Bishop of Durham of an adjoining colliery for twenty-one years, and then signed a memorandum to the effect that they should be entitled to the estate and to the coal royalty in equal shares,—PARKE, B., thought, that the partners did not mean to bind themselves irrevocably for a certain term; by executing the lease, they became indeed bound to the lessor, to work the collieries for a particular term; but they were not thereby or otherwise so bound as between themselves; and any one might determine the partnership.

Dissolution by the court, occasions for, and grounds of.

The court will dissolve a partnership, where it is just and equitable that the partnership should be dissolved, and the partners themselves are unable to do so. The court will interfere for this purpose, where, for example, it has become impracticable to effect or to continue the purposes of the partnership; and therefore, if there is a total absence of workable mineral,—and that is ascertained after due and competent trial, a dissolution will be decreed (*u*). The court will also decree a dissolution, where there has been, on the part of the managing partner, gross breach of faith, wilful fraud, or reckless mismanagement and waste; and also where there exists a permanent and violent dissension between the partners; or where there is (contrary to the partnership agreement) an exclusion of one or more of the

(*t*) (1844), 13 L. J. (N.S.) Exch. 156.

(*u*) *Hanson* v. *Boothman* (1810), 13 East, 22.

co-partners from the management (*x*) ; also, where the managing partner becomes of unsound mind, and his services (being indispensable) cannot longer be given to the business. And apparently the committee of the lunatic partner will not be allowed to continue as a partner, where any other of the partners demand a dissolution (*y*).

Specific provisions applicable to dissolution ;

It is usual in partnership deeds to insert specific clauses dealing specifically with the winding up of the business of the partnership upon a dissolution, that is to say,—clauses providing specifically with regard to the realization of the stock, the collection of the debts, and the mode of disposing of and valuing the assets and goodwill of the business ; and in the absence of any such special provisions relative to the winding up of the business of the partnership, the consequences of a dissolution are,—That the accounts must be taken, and the partnership property sold ; and the net proceeds, after liquidating the liabilities, will be paid to the parties entitled according to their several shares in the concern (*z*). But in the case of mines, there will usually be a reference to the (chief clerk or) master, to inquire whether it will be for the benefit of all parties concerned that the business should be sold as a going concern, or that it should be merely carried on for the purpose of being wound up,—for it is to be remembered that in the case of mines a sale which would be beneficial at one moment may be prejudicial at another ; and the sale, therefore, cannot be ordered without a previous inquiry ; but (subject to that inquiry) the whole colliery must be sold,—even when it comprises divers colliery properties, and one or more of the partners may desire a partition in lieu of a sale (*a*).

and sale necessary, in the absence of such provisions.

Division *in specie*.

But the court might, under exceptional circumstances, order a division *in specie*,—that is to say, might decree what would be (in effect) a partition ; or at least the partner who desired a partition in lieu of a sale, would have leave to bid at the sale. And, of course, it may happen that (under the specific provisions of the partnership deed) the sale may be limited to some particular share. Thus, in *Tatam* v. *Williams* (*b*), where the partners in an already subsisting partnership had entered into a written agreement, whereby,—after reciting that (as they apprehended) it

(*x*) *Marshall* v. *Colman* (1820), 2 Jac. & W. 200 ; *Norway* v. *Rowe* (1812), 19 Ves. 148.

(*y*) *Williams* v. *Rowlands* (1861), 31 L. J. Ch. 265.

(*z*) *Fereday* v. *Wightwick* (1829), 1 Russ. & M. 45.

(*a*) *Wild* v. *Milne* (1859), 26 Beav. 504.

(*b*) (1844), 3 Hare, 347.

would be competent for one partner to determine the partnership, and so to bring the whole property to sale, and that the death of one partner would produce that effect; and after reciting that they (the partners) desired their interests to be so far several as that the share of each partner should be transmissible to his representatives, and that the partnership should not be determined or the entire property sold without the consent of the majority in value of the partners, but that each partner should be competent to sell his own share only,—it was agreed that each of them should hold to himself, transmissible to his own representatives or assigns, an aliquot share of the partnership property, and that the joint holding should not be subject to the ordinary partnership rules applicable to a sale or a dissolution,—The court held, that the agreement did not intend the representatives of a deceased partner to continue partners with the survivors, but only that no partner or his representative should be entitled to a sale of more than his own share,—*scil.*, without the concurrence of the majority in value of the partners.

Sale of single share only.

(2*a*) RECEIVER AND MANAGER.

(2*a*) Receiver and manager.

In the action for a dissolution, all the partners, however numerous, must be parties (*c*); and the plaintiff in such a suit,—as also in an action between partners for an account where the circumstances are such as would entitle the plaintiff to a dissolution,—will be entitled to have a receiver and manager appointed of the partnership business (*d*), one of the partners being usually appointed receiver and manager (*e*). Also, if the partners in a mining business disagree as to their mode of management, and it is indispensable (in the interests of the business) that some regular system should be adhered to, the court will appoint a manager (*f*); but the court will not appoint a manager in the case of a mere disagreement between the partners (*g*),—*scil.*, unless where the defendant is also mismanaging or wasting the property, or is wrongfully excluding the plaintiff from his just control of the management (*h*).

When the court appoints a receiver, the appointment is (and is invariably expressed to be) without prejudice to any prior

(*c*) *Deeks* v. *Stanhope* (1844), 14 Sim. 57.
(*d*) *Goodman* v. *Whitcombe* (1820), 1 J. & W. 689; *Smith* v. *Jeyes* (1841), 4 Beav. 503.
(*e*) *Wilson* v. *Greenwood* (1818), 1 Sw. 471.
(*f*) *Smith* v. *Jeyes*, *supra*; *Jefferys* v. *Smith* (1820), 1 Jac. & W. 298.
(*g*) *Roberts* v. *Eberhardt* (1853), Kay, 148.
(*h*) *Norway* v. *Rowe* (1812), 19 Ves. 144; *Rowe* v. *Wood* (1820), 1 Jac. & W. 315.

mortgagee,—where there is a prior mortgagee,—who may afterwards take possession ; and the court will not in general, appoint a receiver, when the mortgagee is already in possession,—and will only do so when there is a clear case of specific mismanagement or waste by the mortgagee. For, as Lord ELDON said in *Rowe* v. *Wood* (*i*), if a man is mortgagee of a mine, and the mortgagor comes to complain of mismanagement, the first thing that requires consideration is, what is a mortgagee of a mine to do, or what omission on his part may be called mismanagement? There must, in order to justify the court in appointing a receiver in such a case, be clear mismanagement of a particular and specified nature ; and what the plaintiff was, in general, entitled to as against his mortgagee in possession was not the appointment of a receiver, whereby the possession would be taken from the mortgagee, but an order directing that regular accounts should be kept by the defendant of all his receipts, payments, and transactions relative to the mine, with liberty for the plaintiff to inspect the accounts and (in a measure) to control the working of the mine.

And conversely, the mortgagee of a mine (or even of a share in the mine) may, in case of mismanagement of the mine, obtain the appointment of a receiver and manager (*k*),—and that without proceeding to a foreclosure, which is the usual remedy (*l*).

(2*b*) INJUNCTION.

(2*b*) Injunction.

In lieu of appointing a receiver and manager, the court will grant an injunction restraining some particular wrongful act, or some particular wrongful course of conduct. And in the case of mines, this remedy is available,—that is to say, an injunction will be obtainable,—where there is some particular specific grievance of a nature which may properly be redressed by that remedy ; but the court will not by injunction restrain the whole working of the mine,—that is to say, if the mine has been actually worked for a length of time, and is in working condition, the court will not interfere by injunction to stop it (*m*).

(*i*) (1820), 2 Jac. & W. 553.
(*k*) *Bentley* v. *Bates* (1840), 4 You. & C. 182 ; 9 L. J. (N.S.) Exch. Eq. 30.
(*l*) *Redmayne* v. *Forster* (1866), 35 L. J. Ch. 847.
(*m*) *Grey* v. *The Duke of Northumberland* (1806), 13 Ves. 236 ; 17 Ves. 281 ; *Field* v. *Beaumont* (1818), 1 Swanst. 206.

CAPITAL AND INCOME, ON A DISSOLUTION.

The question of distinguishing between capital and profits is a question which arises upon the partnership accounts on a dissolution, and also on every stock-taking during the subsistence of the partnership; and the true answer to the question is always difficult more or less, depending (as it does) partly upon the event which has arisen, and partly upon the law or the express provision of the articles of partnership which is applicable thereto. Thus, in *Ibbotson* v. *Ellam* (*n*), where the partnership articles provided, that the partnership should continue for five years notwithstanding the death of any partner before the expiration of that term; and that the profits should be divided annually, but that before any such division each partner should, at the end of each year, be credited with interest at 5*l.* per cent. on his capital in the business at the beginning of the year; and one of the partners died before the expiration of the five years,—The court held, that the deceased partner's share of the profits (divided at the annual division next after his death) was income of his estate, but that the interest on his share of capital was apportionable,—so much of it as accrued in his lifetime being *corpus*, and the remainder of it income. And in *Wood* v. *Scoles* (*o*), where the plaintiff and defendant had been partners under articles providing that the business should be carried on "for the mutual and common benefit of the partners in equal shares"; and the original capital of each partner was to carry interest at five per cent., to be allowed yearly before making up the accounts; and any additional capital of either partner was to bear interest to be computed at the same rate, but to be payable before any other interest; and it appeared on the dissolution, that while the capital standing to the plaintiff's credit had not much increased, that of the defendant had greatly increased,—the court held (the assets being insufficient to replace the two capitals in full), that the assets, after payment of debts, were to be applied first in repaying to the defendant, with interest, the additional capital brought in by him, and that the residue was to be divided between the partners in proportion to their original capitals (*p*).

(*n*) (1866), L. R. 1 Eq. 188.
(*o*) (1866), L. R. 1 Ch. App. 369.
(*p*) See also *Watney* v. *Wells* (1867), L. R. 2 Ch. App. 250; *Straker* v. *Wilson* (1872), L. R. 6 Ch. App. 503; and *Robinson* v. *Ashton* (1875), L. R. 20 Eq. 25.

MINING COMPANIES,—DISSOLUTION OF.

Mining companies,—dissolution of.

Regarding the dissolution of mining companies,—that is to say, of mining companies properly so called (whether limited or unlimited),—not much can be usefully said in this treatise, this matter being a science of itself and a department of the general law as to the winding-up of companies. But it may possibly be convenient, if the relevant provisions of the Companies Acts, 1862 to 1898 are stated, that is to say :—

(*a.*) IN CASE OF REGISTERED COMPANIES.

(*a*) Registered companies.

By the Companies Act, 1862, a company registered under the Act may be wound up by the court under the following circumstances (that is to say) : (1) Whenever the company has passed a special resolution requiring the company to be wound up by the court ; (2) Whenever the company does not commence its business within a year from its incorporation, or suspends its business for the space of a whole year ; (3) Whenever the members are reduced in number to less than seven ; (4) Whenever the company is unable to pay its debts ; and (5) Whenever the court is of opinion that it is just and equitable that the company should be wound up (s. 79). And a company is deemed unable to pay its debts ; (1) Whenever a creditor (by assignment or otherwise) to whom the company is indebted (at law or in equity) in a sum exceeding 50*l.* then due, has served on the company, by leaving the same at their registered office, a demand under his hand requiring the company to pay the sum so due, and the company has for the space of three weeks succeeding the service of such demand neglected to pay such sum, or to secure or compound for the same to the reasonable satisfaction of the creditor ; or (2) Whenever (in England and Ireland) execution or other process issued on a judgment, decree, or order obtained in any court in favour of any creditor (at law or in equity) in any proceeding instituted by such creditor against the company, is returned unsatisfied in whole or in part ; or (3) Whenever (in Scotland) the *inducie* of a charge for payment on an extract decree, or an extract registered bond, or an extract registered protest, have expired without payment being made ; or (4) Whenever it is proved to the satisfaction of the court that the company is unable to pay its debts (s. 80).

(*aa*) Compulsory winding up of.

Application for.

Every application to the court for a winding-up order is to be made by petition,—which may be presented by the company

or by any one or more creditor or creditors (contributory or contributories) of the company, or by all or any of the above parties ; and the winding-up order operates in favour of all the creditors (and all the contributories) of the company in the same manner as if it had been made upon the joint petition of a creditor and a contributory (s. 82) ; but (by s. 40 of the Companies Act, 1867) no contributory is capable of presenting the petition, unless the members of the company are reduced in number to less than seven, or unless the shares in respect of which he is a contributory (or some of them) either were originally allotted to him or have been held by him (and registered in his name) for a period of at least six months during the eighteen months previously to the commencement of the winding-up, or have devolved upon him through the death of a former holder.

Commencement of.

A winding-up by the court, or (as it is called) a compulsory winding-up, commences at the time of the presentation of the petition for the winding-up (s. 84) ; and the court may, at any time after the presentation of the petition and before making the winding-up order, restrain further proceedings in any action, suit, or proceeding against the company, upon such terms as the court thinks fit (s. 85) ; and once a winding-up order has been made, no suit, action, or other proceeding may be proceeded with or commenced against the company, except with the leave of the court and subject to such terms as the court may impose (s. 87).

Liquidator,—powers of.

The court appoints a liquidator (s. 92) ; and the liquidator has power, with the sanction of the court, to do the following things (among others), that is to say :—To bring or defend any action in the name and on behalf of the company ; to carry on the business of the company, so far as may be necessary for the beneficial winding-up of the same ; to sell the real and personal property, effects, and things in action of the company ; to prove (and draw a dividend) in the bankruptcy of any contributory, for any balance against the estate of such contributory, rateably with the other separate creditors ; to raise (upon the security of the assets of the company) from time to time, any requisite sum or sums of money ; and to do and execute all such other things as may be necessary for winding up the affairs of the company and distributing its assets (s. 95). And when the affairs of the company have been completely wound up, the court makes an order that the company be

CHAP. IX.

CO-PARTNERSHIPS AND MINING COMPANIES.

(*bb* Voluntary winding up of.

dissolved from the date of such order, and the company shall be dissolved accordingly (s. 111).

A company registered under the Act may also be wound up voluntarily,—whenever (1) the period (if any) fixed for the duration of the company expires, or whenever the event (if any) occurs, upon the occurrence of which the company is to be dissolved, and the company in general meeting has in either case passed a resolution requiring the company to be wound up voluntarily ; or (2) whenever the company has passed a special resolution for a voluntary winding up ; or (3) whenever the company has passed an extraordinary resolution, to the effect that it has been proved to their satisfaction that the company cannot by reason of its liabilities continue its business and that it is advisable to wind up the same (s. 129).

And a voluntary winding-up commences at the time of the passing of the resolution authorising the winding-up (s. 130) ; and from the date of the commencement of such winding-up, the company ceases to carry on its business, except for the beneficial winding up thereof (s. 131). And in the voluntary winding-up, the property of the company is applied in satisfaction of its liabilities *pari passu* ; and (subject thereto) is, in general, distributed amongst the members according to their rights and interests in the company ; and for that purpose, a liquidator or liquidators are appointed. And upon such appointment, all the powers of the directors cease, except in so far as the company in general meeting (or the liquidators) may sanction the continuance of such powers ; and the liquidator or liquidators may (without the sanction of the court) exercise all the powers which by the Act are given to the liquidator in a compulsory winding up. The liquidator or liquidators may also exercise the power of settling the list of contributories of the company, any list so settled being made *primâ facie* evidence of the liability of the persons named therein as contributories ; and may at any time after the passing of the resolution for winding up the company (and before they have ascertained the sufficiency of the assets of the company) make calls on all or any of the contributories for the time being settled on the list (s. 133).

Also, where a company is in course of being wound up voluntarily, and proceedings are taken for the purpose of having the same wound up by the court, the court may, if it thinks fit, notwithstanding that it makes an order directing the company to be wound up by the court, provide in such order (or in any

other order) for the adoption of all or any of the proceedings taken in the course of the voluntary winding-up (s. 146) ; and the court may also order that the voluntary winding-up shall continue, but subject to the supervision of the court (s. 147) ; and a petition, praying wholly or in part that a voluntary winding-up should continue, but subject to the supervision of the court, is deemed (for the purpose of giving jurisdiction to the court over actions) to be a petition for a winding-up order (s. 148) ; but the court may, in determining whether a company is to be wound up by the court or subject to the supervision of the court, have regard to the wishes of the creditors or contributories, and may, for the purpose of ascertaining their wishes, direct meetings of the creditors or contributories to be held ; and in the case of creditors, regard is to be had to the value of the debts due to each creditor; and in the case of contributories, regard is to be had to the number of votes of each contributory (s. 149).

(*cc*) Voluntary winding up, under supervision.

When the order made is for a winding-up subject to the supervision of the court, the liquidators appointed to conduct the winding-up may (subject to any restrictions imposed by the court) exercise all their powers, without the sanction of the court, in the same manner as if the company were being wound up voluntarily ; and otherwise the proceedings under a supervision order do not differ from the proceedings under a compulsory order (s. 151).

Contributories,—liability of.

And as regards the liability of present and past members of the company, it is provided, that every present and past member of the company shall be liable to contribute to the assets of the company to an amount sufficient for the payment of the debts and liabilities of the company, and the costs, charges, and expenses of the winding-up, and for the payment of such sums as may be required for the adjustment of the rights of the contributories amongst themselves, with the qualifications following (that is to say) :—(1) No past member shall be liable to contribute to the assets of the company, if he has ceased to be a member for a period of one year or upwards prior to the commencement of the winding-up ; or be liable to contribute in respect of any debt or liability of the company contracted after the time at which he ceased to be member ; or be liable to contribute to the assets of the company, unless it appears to the court that the existing members are unable to satisfy the contributions required to be made by them ; and (2) In the case of a company limited

by shares, no contribution required from any member is to exceed the amount (if any) unpaid on the shares in respect of which he is liable (as present or past member); and in the case of a company limited by guarantee, no contribution is to exceed the amount in that behalf appointed by the memorandum of association (s. 38).

(*b.*) IN CASE OF UNREGISTERED COMPANIES.

(*b*) Unregistered companies,—winding-up of.

Companies not registered under the Act, may also be wound up under the Act, s. 199 having enacted that (in effect) any partnership, association, or company (except illegal companies (*q*) and except railway companies incorporated by Act of Parliament), consisting of more than seven members, and not registered under the Act, may be wound up under the Act; and all the provisions of the Act with respect to winding up are made applicable to such companies,—save that the winding up must be wholly by the court, that is to say, under a compulsory order.

(*c.*) IN CASE OF COST-BOOK COMPANIES.

(*c*) Cost-book mining companies,—winding up of.

Where the company is one which was formed for working mines in the Stannaries, then (irrespectively of the amount of the capital of the company) the Stannaries Court is the forum for winding it up (*r*),—but if the company is actually working mines outside the jurisdiction of the Stannaries, or is engaged in any other undertaking beyond the limits of that jurisdiction, either the High Court or the County Court of the district (according as the capital of the company exceeded 10,000*l.*, or did not exceed that amount) would be the forum for the winding-up (*s*); and the Stannaries Court, when seised of the jurisdiction to wind up, has all the incidental powers of the High Court (*t*). The Stannaries jurisdiction has now been vested in the county court of Cornwall holden at Truro (*u*),—and the procedure upon a winding-up has been assimilated to the procedure in an ordinary county court (*x*). But, *semble*, when the limit of the ordinary jurisdiction of the county court would be exceeded, the matter,

(*q*) *In re South Wales Atlantic Steamship Co.* (1876), 2 Ch. D. 763.

(*r*) 53 & 54 Vict. c. 63, s. 1 (4); *East Botallach Mining Co.* (1864), 34 Beav. 82; *New Terras Mining Co.*, [1894] 2 Ch. 344.

(*s*) 53 & 54 Vict. c. 63, s. 1 (2), (3); *Penhale and Lomax Mining Co.* (1867), L. R. 2 Ch. App. 398; *Silver Valley Mines* (1881), 18 Ch. D. 482.

(*t*) 53 & 54 Vict. c. 63, s. 1 (6).

(*u*) 59 & 60 Vict. c. 45; Stannary Rules, February, 1897.

(*x*) Stannary Rules, February, 1897, r. 6.

although to be intituled in the county court of Cornwall, is to have the words "*Stannaries Jurisdiction*" added to the title; and special provisions have been made for increasing professional fees and allowances in such a case (*y*).

Special statutory provisions applicable to.

Also, upon every such winding-up, certain special provisions have been made for the Stannaries by the Stannaries Acts, 1869 and 1887 (*z*), that is to say,—(1) The wages of workmen (to the extent of three months' wages) are entitled to priority, and are made a first charge upon the assets of the company, having priority even over the landlord of the mines and over all mortgagees and creditors (*a*); and any fund created out of the wages of the miners (whether a club fund, or accidents fund, or sick fund, or other like fund) is declared to be the property of the miners, and is not assets of the company upon a winding up (*b*). (2) The debts due from the company which is in course of winding up to a contributory in another company which is also in course of winding up may be retained by way of security for the calls made or to be made on the contributory,—but without prejudice to any lien on such debts (*c*). (3) Transfers of shares, when such transfers are made to impecunious persons, may be regarded as fraudulent,—so as that the transferor shall *de facto* remain liable as the contributory (*d*); but (subject to that provision) a former shareholder, notwithstanding the provision contained in the Companies Act, 1862, s. 200, shall not be liable to contribute to the assets of the company, if he has ceased to be a shareholder for a period of two years or upwards before the mine has ceased to be worked, or before the date of the winding-up order (*e*). And (4) Any dividends in a winding-up which have remained for two years unclaimed are to be invested and accumulated (*f*).

(3) SPECIFIC PERFORMANCE.

(3) Specific performance.

Thirdly, the Remedy of Specific Performance.—The court will not, in general, decree specific performance of a partnership agreement,—*scil.*, where no term is fixed for the duration of the partnership, and there has been no part-performance (*g*). And

(*y*) Stannary Rules, February, 1897 r. 7.
(*z*) 32 & 33 Vict. c. 19; 50 & 51 Vict c. 43.
(*a*) Act 1869, s. 25; Act 1887 s. 4.
(*b*) Act 1887, s. 13 (2).
(*c*) Act 1869, s. 34.
(*d*) *Ibid.* s. 35.
(*e*) *Ibid.* s. 25.
(*f*) Act 1887, s. 29.
(*g*) *Buxton* v. *Lister* (1746), 3 Atk. 385; *Hercey* v. *Birch* (1804), 9 Ves. 357; *Scott* v. *Rayment* (1868), L. R. 7 Eq. 112.

in *Vickers* v. *Vickers* (*h*), where two partners (A. and B.) agreed that B. should buy out A., but that if B. should, during A.'s life, desire to retire, A. should have an option of re-purchase, on the terms specified in the agreement (and which included a valuation); and B. gave notice of his intention to retire, whereupon A. gave notice of his intention to re-purchase; but B. afterwards refused to carry out the agreement on his part (that is to say, refused to appoint a valuer),—the court held, that the contract between the parties could not be specifically enforced,—*scil.*, because *until the valuation*, there was no contract at all.

The court will sometimes, by injunction, specifically enforce a particular clause in the co-partnership articles,—*e.g.*, the clause for the insertion of the plaintiff's name in the co-partnership style (*i*); also, the clause restraining any of the partners from carrying on any other business (*k*); and, even in the absence of such latter clause, the court will, by injunction, restrain any partner from carrying on a *rival* business (*l*),—that being a wilful breach of the good faith which is required between partners.

(*h*) (1867), L. R. 4 Eq. 529.
(*i*) *Marshall* v. *Colman* (1820), 2 Jac. & W. 266.
(*k*) *Somerville* v. *Mackay* (1810), 16 Ves. 382.
(*l*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 30.

CHAPTER X.

ON AGREEMENTS,—FOR THE SALE OF MINES, AND FOR A LEASE OF MINES; AND ON THE CAPACITY TO MAKE SUCH SALES AND LEASES.

SECTION I.—*On Agreements for Sales and Leases.*

Writing,—required for agreement regarding mines.

THE Statute of Frauds (29 Car. 2, c. 3) requires every agreement affecting lands (or affecting any estate or interest in lands) to be in writing, and signed by the party to be charged therewith; and an agreement for a lease of mines, or for a mining license (as commonly understood), or for the sale and purchase of mines, falls within these provisions of the statute.

THE WRITING REQUIRED.

Writing,—what is a sufficient.

And upon this statute, these points are to be observed, namely: —(1) That the signature of the party to be charged is sufficient, and the signature of both the parties (although usual) is not necessary (*a*); (2) That a note or memorandum of the agreement, without any formal agreement, is sufficient,—provided it contain the names of the parties, the consideration, and the subject-matter (or parcels) (*b*); (3) That when the agreement is contained in two or more writings, the writings must be connected *on the face of them* (*c*), or otherwise sufficiently connected (*d*); and (4) The signature of the party's agent will suffice,—provided he was the agent for this purpose, and signed as such; *secus*, if he was not authorised to sign, or if he signed without any intention of contracting for his principal (*e*); and the agent's authority may be supplied *ex post facto* (*f*).

(*a*) *Laythoarp* v. *Bryant* (1836), 2 Bing. N. C. 735; *Seton* v. *Slade* (1802), 7 Ves. 274.

(*b*) *Williams* v. *Lake* (1859), 2 El. & El. 349; *Sale* v. *Lambert* (1874), L. R. 18 Eq. 1; *Rossiter* v. *Miller* (1877), 3 App. Cas. 1124.

(*c*) *Boydell* v. *Drummond* (1809), 11 East, 142.

(*d*) *Nene Valley* v. *Dunkley* (1876), 4 Ch. D. 1; *Long* v. *Millar* (1879), 4 C. P. D. 450; *Pearce* v. *Gardner*, [1897] 1 Q. B. 688.

(*e*) *Smith* v. *Webster* (1876), 3 Ch. D. 56.

(*f*) *Dickinson* v. *Dodds* (1875), 2 Ch. D. 463; *Bell* v. *Balls*, [1897] 1 Ch. 663.

WRITING, PRESENCE OR WANT OF,—EFFECT OF.

Writing,—not of itself sufficient, unless an agreement in fact.

But, of course, where there is, in fact, no agreement as yet arrived at, a mere purported compliance with the Statute of Frauds will not make that a contract which was not a contract (*g*) ; still less will any mere compliance with that statute make a contract enforceable which (apart from the statute) was not enforceable (*h*).

Writing, want of,—not material, where part performance.

And, on the other hand, where there is a contract and it is not in writing, it will be enforceable in equity, where there have been acts of part performance of the contract,—*e.g.*, where the possession has been given and taken (*i*), or has been continued (*k*), under the contract, and expenditure has thereafter followed upon the faith of the contract.

"UNDERSTANDINGS."

"Understanding,"—not an agreement ;

An "*understanding*" is not an agreement ; and an "*inchoate agreement*," being an agreement which leaves the price unfixed, is not an agreement until the price is fixed. But in either case, the understanding or inchoate agreement may become enforceable as an agreement,—as, *e.g.*, when works of an expensive character have been constructed by the one party with the full knowledge of the other and upon the faith of the understanding being duly adhered to (*l*) or of the inchoate agreement being duly perfected (*m*), and the works so constructed would be useless (and the outlay thereon lost) by the determination (whether from mere caprice or for the purpose of extortion) of the understanding or inchoate agreement ; *secus*, if the determination would not have that effect (*n*).

but may become enforceable as an agreement.

FORMAL AGREEMENTS.

Writing, when it provides for a subsequent

The written memorandum or note of a contract sometimes provides,—and especially when the contract is contained in correspondence,—that a formal agreement shall be drawn up,—

(*g*) *May* v. *Thompson* (1882), 20 Ch. D. 705 ; *Bellamy* v. *Debenham*, [1891] 1 Ch. 412.

(*h*) *South African Territories* v. *Wallington*, [1898] A. C. 309.

(*i*) *Surcombe* v. *Pinniger* (1853), 3 De G. M. & G. 571.

(*k*) *Hodson* v. *Heuland*, [1896] 2 Ch. 428.

(*l*) *Jackson* v. *Cator* (1800), 5 Ves. 687, citing (on p. 689) *Clavering's Case*.

(*m*) *Powell* v. *Thomas* (1848), 6 Ha. 300.

(*n*) *Bankart* v. *Tennant* (1870), L. R. 10 Eq. 141.

or that a formal agreement, to the satisfaction of the solicitors for the respective parties, shall be drawn up ; and when that is so, and no formal agreement is, in fact, drawn up, the written note or memorandum may or may not be the complete contract between the parties and enforceable as such ; that is to say, if it contains their final agreement, it is their contract (*o*) ; and if it does not, then it is not their contract (*p*),—and the question is in all cases one of the true construction of the written note or memorandum (*q*).

formal agreement,—effect of.

AGREEMENTS BY OFFER AND ACCEPTANCE.

Where a contract arises from an offer and an acceptance of that offer,—the acceptance must be absolute, not varying anything in the offer (*r*) ; but where the purported acceptance contains a variation, it may be treated as an offer, or counter-offer, for the consideration of the party making the first offer, and he may either accept or reject it (*s*). Also, a man may beforehand say that he will accept, *e.g.*, the highest offer (*i.e.*, proposal), when two or more specific offers are arranged to be made ; and in *South Hetton Coal Co.* v. *Haswell Coal Co.* (*t*), the promised acceptance was of the "*highest net money tender* (all other things being equal and satisfactory),"—and the person who made such highest tender (being a tender in legal business form) would be entitled to enforce the acceptance of it, *semble*.

Contract,—by offer and acceptance.

INDEFINITENESS,—EFFECT OF.

A contract may be void for indefiniteness or uncertainty in its terms ; thus, *e.g.*, a contract to take on lease the mines of the lessor at B.,—B. being neither a township or parish or other definite local district,—would be (or might be) void for uncertainty (*u*) ; but the apparent indefiniteness will sometimes be removed by parol evidence (*x*).

Contract,—when and when not void for indefiniteness.

In *Haywood* v. *Cope* (*y*), where the plaintiff agreed to let and the defendant to take two specified seams of coal (within an area

Indefiniteness,—cure of, by

(*o*) *Rossiter* v. *Miller* (1878), 3 App. Cas. 1124 ; *North* v. *Percival*, [1898] 2 Ch. 128.
(*p*) *Lloyd* v. *Newell*, [1895] 2 Ch. 744.
(*q*) *Rossiter* v. *Miller*, *supra*.
(*r*) *Routledge* v. *Grant* (1828), 4 Bing. 660.
(*s*) *Pattle* v. *Hornibrook*, [1897] 1 Ch. 25.
(*t*) [1898] 1 Ch. 465.
(*u*) *Lancaster* v. *De Trafford* (1862), 31 L. J. Ch. 554.
(*x*) *Shardlow* v. *Cotterell* (1881), 20 Ch. D. 90.
(*y*) (1858), 25 Beav. 140 ; 27 L. J. (N.S.) Ch. 468.

possession given or taken, etc.

to be thereafter defined) situate under the A. estate (which was an estate of twenty-seven acres only); and the defendant entered into possession and began working the seams; and the draft lease (defining the area) was afterwards sent to him for his approval, but he never returned the draft approved, although he continued to work the seams for a year and a half longer,—when he abandoned the mines as unprofitable; and the plaintiff refused to accept the notice of abandonment, and sued to enforce specific performance of the agreement,—The court granted specific performance,—saying, that the area was sufficiently defined; that the defendant knew that the profit to be derived from working the seams was speculative; and that (at the most) the defendant was morally entitled to some abatement of the rents payable under the agreement,—but such abatement was not a matter for the court at all; and the court could not exercise its discretion (except judicially) to refuse specific performance (*z*).

Indefiniteness not cured,—through the fault of both parties.

In *Lancaster* v. *De Trafford* (*a*), where the plaintiff was to have a year to try certain ironstone of the defendants, and offered (if the trial was satisfactory) to accept a lease of the ironstone within an area (to be thereafter defined) of the P. estate,—which was a large estate, and on portion of the surface of which large engineering works had been erected under a lease of the surface from the same lessor (the defendant),—which offer the defendant (through his agent) accepted; and the plaintiff was let into possession,—but afterwards the defendant neglected to define the mineral area, upon the pretext that the plaintiff had (in his original offer) promised to find responsible sureties for the rent and covenants to be reserved by and inserted in the lease, the plaintiff not being himself a man of substance,—the court dismissed (but without costs) the plaintiff's bill for specific performance, considering both parties were (more or less) to blame, the plaintiff for not finding the sureties, and the defendant for not defining the area.

Time,—is of the essence, in a mining contract.

Time is of the essence of the contract, in all agreements whether for the lease (*b*) or for the sale (*c*) of mines; and also, in general, for all agreements for the sale of coal (*d*) or other articles the market price of which fluctuates from day to day.

(*z*) Citing *Burgess* v. *Wheate* (1759), 1 Eden, 177; *Rooke's Case* (1598), 5 Rep. 99 b.

(*a*) (1862), 31 L. J. (N.S.) Ch. 554.

(*b*) *Prendergast* v. *Turton* (1841), 1 You. & Col. C. C. 110; *Huxham* v. *Llewellyn* (1873), 21 W. R. 570, 766.

(*c*) *Walker* v. *Jeffreys* (1842), 1 Ha. 341; *City of London* v. *Mitford* (1807), 14 Ves. 58; *Alloway* v. *Braine* (1859), 26 Beav. 575.

(*d*) *Pollard* v. *Clayton* (1855), 1 K. & J. 462.

POSSESSION TAKEN UNDER CONTRACT,—EFFECTS OF.

Possession taken under contract,—effect of, in general.

Usually, where the purchaser of real estate enters into the possession thereof before the actual completion of the purchase, he waives thereby all right of further objection to the vendor's title ; but the special circumstances under which the possession was given and taken may make a difference (*e*) ; and the purchaser of a share in a mining company does not, in the general case, waive all objections to the title of his vendor of the share, by merely acting as a partner in the company (and by taking possession as such),—*scil.*, when it was intended that he should so act at once (*f*). And it may be stated generally, that there is a broad distinction between cases in which the contract of sale itself provides that a good title shall be shown, and also provides that possession may be taken by the purchaser before the title is completed ; and cases in which the purchaser takes possession, without any express stipulation to that effect in the contract. And (with reference to the acts which are relied upon as amounting to a waiver of the right to a good title being shown) there is also a broad distinction between cases in which the objections to the title are removable by the vendor, and cases in which (to the purchaser's knowledge) they are not removable,—*scil.*, because where a purchaser knows of the existence of conditions or circumstances affecting the title to the property, and that the vendor has no control over them, and he, notwithstanding, thinks fit to take possession of the property or to remain in possession (and to make, *e.g.*, structural alterations in it), he waives "*his right to insist on the particular irremovable objections of which he had knowledge before he took possession*" (*g*).

Possession taken under contract,—effect of, in case of mines.

Where the defendant has agreed to accept a lease of mines, and he enters into possession of the mines before the lease is granted, his entry is not to be construed as an acceptance of the lessor's title to grant the lease,—it being, in general, necessary in the case of mining property to take immediate possession, and much time being sometimes lost before the lease is finally settled (*h*).

(*e*) *Bown* v. *Stenson* (1857), 24 Beav. 631 ; *Burnell* v. *Brown* (1820), 1 J. & W. 168.

(*f*) *Stevens* v. *Guppy* (1826), 3 Russ. 171.

(*g*) *In re Gloag and Miller's Contract* (1883), 23 Ch. D. 320.

(*h*) *Haywood* v. *Cope* (1858), 27 L. J. (N.S.) Ch. 468.

Possession of part,—when and when not possession of the whole.

Where there is an agreement for a lease of coal or other mines, and the lessor permits the lessee to take possession before the lease is granted, and the lessee takes possession accordingly, he is to be considered as constructively in possession of the whole mineral area agreed to be demised (*i*) ; but it would not be in accordance with equity, to hold that such constructive possession extended to any mineral area beyond, which (by inadvertence) was included in the agreement (*k*).

OPTIONS OF PURCHASER.

Option of purchaser,—to give up possession or else pay into court his purchase money.

Under ordinary circumstances, where a purchaser has been let into possession before conveyance and payment of the purchase money, an option is given to him to relinquish the possession, or else (if he will continue in possession) to pay the purchase money into court (*l*) ; but where the circumstances are not of the ordinary character,—*e.g.*, if the property (being a coal mine) is being gotten by the purchasers ; or if the nature of the property is otherwise being altered,—then he is not given such option, but must pay the purchase money into court (*m*).

Where agreement for purchase of coal,—and purchaser is in possession, and getting the coal.

In *Buck* v. *Lodge* (*n*), where the defendant had agreed to purchase all the coal under certain lands of the plaintiff, at a price payable by instalments, and the first of which was payable at the end of the first two years ; and the defendant had been given possession, and had worked and was working the coal, but no conveyance had yet been executed to him,—the court ordered him to pay into court the instalment which had fallen due. Also, in *Lewis* v. *James* (*o*), where the defendant had agreed for an under-lease of certain coal of which the plaintiffs were the lessees, and which coal adjoined other coal of the defendant ; and the defendant was in possession and (through his adjoining mine) was working and getting the coal agreed to be demised to him, but no underlease thereof had as yet been executed,—the court ordered him to pay into court the dead rent and the royalty accrued under the agreement,—without prejudice to his right to set aside the agreement and to recover damages for the alleged fraud of the plaintiffs in inducing him to enter into the agreement.

(*i*) *Davis* v. *Shepherd* (1866), L. R. 1 Ch. App. 410.
(*k*) *Ibid.*
(*l*) *Lewis* v. *James* (1886), 32 Ch. D. 330.
(*m*) *Cutler* v. *Simmons* (1816), 2 Mer. 103 ; *Pope* v. *Great Eastern Rail. Co.* (1866), L. R. 3 Eq. 171.
(*n*) (1812), 18 Ves. 450.
(*o*) (1886), 32 Ch. D. 326.

Possession given and subsequently resumed by vendor,—effect of.

Where the vendor has given the purchaser possession, before completion of the contract,—and he subsequently resumes the possession, that resumption of the possession may (*p*) or may not (*q*) be a bar to his claim for specific performance,—according as the immediate possession was or was not an essential term of the sale, and (in a sense) portion of the very subject-matter of the purchase.

Option to purchase excepted mines,—in the event of the vendor selling them.

In *Birmingham Canal Co.* v. *Cartwright* (*r*), there had been a conveyance of surface lands reserving the mines, but with a first option in the purchaser to buy the reserved mines in case the vendor should afterwards sell the adjoining mines ; and the purchaser had sold his surface lands to the plaintiff company, assigning to them (at the same time) his option ; and the original vendor had died devising his estates to the defendant C. ; and subsequently C. sold the adjoining minerals (and adjoining surface lands) to the defendant X.,—whereupon the plaintiff company purported to exercise their option ; and the defendants refusing to convey, the plaintiff company sued them for specific performance of the contract,—and the court held, that the plaintiff company was entitled to specific performance. Which decision was undoubtedly good law, assuming that the option to purchase was well created in the first instance,—that is to say, assuming that it was not obnoxious to the rule against perpetuities (*s*).

Verbal contract of ancestor, completed by heir,—effect of, as between heir and next of kin.

Where A. (the owner in fee simple of a freehold estate) entered into a verbal contract with B. for the sale of the estate, and died intestate before completing the contract,—and the heir of A. completed the contract at the request of B., and gave a receipt for the purchase money as the administrator of A., the court held, that the purchase money was divisible among the next-of-kin of A., and did not belong exclusively to the heir of A.,—although if the heir had chosen to disregard the verbal contract of his ancestor, and to sell the estate by an independent contract of his own, it would have been different (*t*).

DAMAGES RECOVERABLE FOR BREACH OF CONTRACT.

Damages for breach of contract to

Where a person who has no title at all to mines (and no power at all to lease them) enters into a contract to grant a

(*p*) *Knatchbull* v. *Grueber* (1817), 3 Mer. 124.
(*q*) *Colby* v. *Gadsden* (1865), 34 Beav. 416.
(*r*) (1879), 11 Ch. D. 421.
(*s*) *London and South Western Rail. Co.* v. *Gomm* (1882), 20 Ch. D. 562.
(*t*) *Frayne* v. *Taylor* (1863), 33 L. J. Ch. 228.

lease of them, and the total want of title or of leasing power is discovered before the purported lease is accepted, the intending lessee is entitled to substantial damages for the breach of contract (*u*) ; but where the intending lessor has some title, but (on investigation) his title is found defective, only nominal damages are recoverable for the breach of contract (*x*). And if, in either of such cases, the want of title or (as the case may be) the defect in the title should not be discovered until after the lease is executed, and possession taken or attempted to be taken, the lessee would be entitled to recover damages for breach of the lessor's covenant for quiet enjoyment, or (when there was an express covenant for title) for breach of the covenant for title ; and in either case, the damages which would be recovered would be substantial.

Let mines,—according as lessor has no title at all, or a title which is defective.

In *Engel* v. *Fitch* (*y*), the plaintiff was the purchaser of a leasehold with possession, and he sub-sold his purchase to H. at a profit,—which profit he afterwards lost, through being unable to complete, and his vendor (the defendant) was the cause of that inability,—for he had refused to get the possession and to deliver it to the plaintiff ; and the court held the plaintiff entitled to recover as damages the profit of the sub-sale,—in addition, of course, to the return of his deposit and to his expenses of investigating the title ; and the court said, that the rule whereby nominal damages only were recoverable was only applicable to a vendor who was the true and full owner, but whose title occasioned a difficulty ; and for any inability of another sort to complete, as also for refusal to complete, the rule was, that substantial damages were recoverable.

Damages,—loss of profit on a sub-sale by purchaser, when recoverable, and when not.

SECTION II.—*The Capacities of Vendors and of Lessors.*

(*a.*) IN RESPECT OF THEIR ESTATES.

(1) Fee simple tenant.

Proceeding now to consider the capacity of vendors and lessors to make sales and leases of mines.—Tenants in fee-simple, who are the owners of both the lands and of the mines therein and thereunder (being freehold lands and mines), may, by virtue merely of their estates, either make absolute sales or grant

(*u*) *Robinson* v. *Hurman* (1848), 1 Exch. 850 ; *Hopkins* v. *Grazebrook* (1826), 6 B. & C. 31.

(*x*) *Flureau* v. *Thornhill* (1776), 2 W. Bl. 1078 ; *Walker* v. *Moore* (1829), 10 B. & C. 416.

(*y*) (1867), L. R. 3 Q. B. 314.

leases of the mines, and may grant mining licenses and all sorts of rights in respect of either the lands or the mines,—and that without any restraint, either as to the duration of the term, or as to the powers conferred,—because they have an absolute power of alienation. But tenants in tail, or for life, or for years, and tenants by *elegit* or by statute merchant and statute staple, or anyone possessed merely of a limited estate or interest in the lands, can only (at the common law, that is to say, by virtue of their estates and interests) make leases to the extent of their estates or interests, and with only such powers (at the most) as the lessors themselves might exercise. And as regards lands in mortgage, it appears, that (apart from any express powers contained in the mortgage deed or conferred by statute) the mortgagor cannot make any lease to bind more than his equity of redemption,—although, possibly, when the estate is discharged from the mortgage, the mortgagor's lease will be good against himself by estoppel ; and if therefore a mortgagor grants a lease *subsequently* to the mortgage, the mortgagee may evict the lessee without notice (*z*). And as regards the mortgagee, although he is the actual owner of the estate at law, yet he cannot (or at least could not) make a valid lease in equity,—unless there existed some absolute necessity for it (*a*) ; consequently, both mortgagor and mortgagee used, in general, to concur in order to make a binding lease.

(2) Tenant in tail or for limited estate.

(3) Mortgagors and mortgagees.

As regards tenants in tail, they may (in the general case) bar the estate tail, and so acquire an estate in fee simple ; and thereafter they may, of course, lease like any other fee simple owner ; but a tenant in tail, while being and remaining merely a tenant in tail, could not (at the common law) lease beyond his own life ; and yet his lease would not have been absolutely void upon his death, but would have been voidable only at the election of, and might therefore be confirmed by, the heir in tail or by the remainderman or reversioner (*b*).

As regards the lands of a married woman, a lease of her fee simple estate, if made by the husband and wife jointly, was (by the common law) either voidable or void. For, firstly, if the lease was made by deed, it was not void but voidable,—that is to say, it might be avoided by the wife when left a widow or by her second husband or by the heirs of the wife ; and it

(4) Married women.

(*z*) *Doe* v. *Maisey* (1828), 8 B. & C. 767.

(*a*) *Hungerford* v. *Clay* (1722), 9 Mod. 1.

(*b*) *Doe* v. *Jenkins* (1829), 5 Bing. 469.

would therefore be confirmed by acceptance of rent (*c*). But, secondly, if the lease was made by parole or without deed, then it was absolutely void (*d*). And, thirdly, all such leases, if made by the husband alone, were absolutely void (*e*). But as regards a wife's leasehold estate in lands, her husband might (of himself alone) have made a valid lease thereof ; and it made no difference, if the wife was only executrix or administratrix (*f*), or if the term had been assigned before her marriage, in trust for her, without his privity (*g*).

(5) Infants.

And as regards the lands of an infant, it appears, that infants might (by the common law) make leases, but such leases were voidable by them on their attaining their full age and might be avoided also by their heirs (*h*) ; but being voidable only and not void, they might have been (and would have been) confirmed by the acceptance of rent (*i*), or by any other acknowledgment of the tenancy (*k*).

(*b.*) IN RESPECT OF THEIR POWERS.

Settled estates,—express powers required for the letting or selling of the minerals.

Because of the uncertainty which attached to the leases granted at the common law by limited owners,—and in order to avoid also certain other difficulties which attended upon such leases, specific powers of leasing were commonly inserted in all settlements of lands ; and apart from any special power in that behalf applicable contained in the settlement or conferred by statute, a lease or sale cannot be made either of the settled land itself or of the mines and minerals therein or thereunder ; and the court would not (and could not) ignore that impossibility, even where the sale or lease proposed to be executed was shown, to the satisfaction of the court, to be beneficial (*l*). Therefore every settlement of lands containing minerals was required to contain special powers for the letting and for the selling of the minerals (*m*) ; and such express powers are still necessary, excepting so far as they are now conferred by statute.

Lease in execution of agreement,—form of ;

Where (as usually is the case) there is first an agreement for the lease, and afterwards there is the lease, care must be taken to see that the lease is in conformity with the agreement ; and a

(*c*) *Whetstone* v. *Wentworth* (1557), Dy. 159 a.
(*d*) *Doe* v. *Weller* (1798), 7 T. R. 478.
(*e*) (1670), 2 Saund. 180, n. 9.
(*f*) *Arnold* v. *Bidgood* (1612), Cro. Jac. 318
(*g*) *Pitt* v. *Hunt* (1681), 1 Vern. 18.
(*h*) (1572), Plowd. 418.
(*i*) *Smith* v. *Low* (1739), 1 Atk. 489.
(*k*) 4 Leon. 4.
(*l*) *Wood* v. *Patteson* (1847), 10 Beav. 541.
(*m*) *Jervoise* v. *Clark* (1821), 6 Madd. 96.

literal conformity will not always suffice,—but (in some cases, at least) it will be necessary to introduce a certain amount of variation,—*e.g.*, where a considerable period has intervened between the agreement and the lease, and the mines have been in work during the interval,—and otherwise (as in *Jervis* v. *Tomkinson*) (*n*) the lessee may sustain very great inconvenience amounting even (as in the case cited) to disaster.

with a variation, where a considerable interval between.

TERM AND ESTATE.

Estate of lessee,—and *term* of lease,—distinction between.

And where, for example, the agreement fixes (and it always should fix) the date as from which the term of years is to commence and be computed, and the lease is dated subsequently to the date so fixed,—the lease creating the *estate* (that is to say, the term in point of *interest*),—it is not sufficient to merely state in the Habendum, that the term is to be computed from the date in that behalf mentioned in the agreement; but it is necessary also to have regard to that date in the covenants of the lessee and in other the stipulations and conditions on the lessee's part (and on the lessor's part also) contained in the deed (*o*); and the phrase "*during the term*" or "*during the continuance of the term*" will denote during the continuance of the *estate* created by the lease, and not during the *time* for which (commencing at the date in that behalf specified in the agreement) the lease was granted (*p*).

Regarding agreements for the lease of coal mines,—and which agreements sometimes operate as actual leases of the mines, and sometimes do not so operate (*q*),—a distinction which is not now of much (if any) practical importance (*r*),—the term must, of course, be defined, that is to say, the duration of the term and the day as from which it is to commence (*s*); and where only a royalty rent (and no dead, or certain, or minimum rent) is reserved, the duty to work commences, in general, forthwith on the execution of the agreement (*t*),—unless where the agreement otherwise specifically provides (*u*).

(*n*) (1856), 1 H. & N. 195.
(*o*) *Jervis* v. *Tomkinson* (1856), 1 H. & N. 195.
(*p*) *Wyburd* v. *Tuck* (1799), 3 Keb. 207; 1 Bos. & P. 464; *Jervis* v. *Tomkinson*, *supra*.
(*q*) *Morgan* v. *Bissett* (1810), 3 Taunt. 65; *Jones* v. *Reynolds* (1841), 1 Q. B. 506; *Daniel* v. *Gracie* (1844), 6 Q. B. 145; *Morgan* v. *Morgan* (1844), 14 L. J. (N.S.) C. P. 5.
(*r*) *Walsh* v. *Lonsdale* (1882), 21 Ch. D. 9.
(*s*) *Marshall* v. *Berridge* (1881), 19 Ch. D. 233; *Doe* v. *Benjamin* (1839), 9 Ad. & E. 644.
(*t*) *Sharp* v. *Wright* (1859), 28 Beav. 150.
(*u*) *Greene* v. *Sparrow* (1725), 3 Sw. 408.

In *Jervis* v. *Tomkinson* (*x*), where there was an agreement for the demise of a salt mine,—at a royalty or uncertain rent, but with provisions to the effect that a minimum or certain rent of 50*l.* per annum should be payable ; and under that agreement, the intended lessees entered and began to sink a shaft to the brine (which they were obliged to discontinue, the shaft becoming flooded) ; and they began to sink another shaft (which also became flooded and was discontinued) ; and thereafter they did nothing,—except that they (inconsiderately) accepted a *lease* of the salt mine pursuant to the agreement, the lease containing a proviso for cesser of the *lease* in case "during the continuance of the *term*" the salt should fail "through any inevitable accident,"—The court held the lessor entitled to the 50*l.* rent, the agreement to pay it being deemed absolute,—and the successive floodings of the shafts (as they had occurred before the expiration of the lease) not being accidents happening "during the continuance of the *term*,"—*scil.*, because the term only commenced in point of interest (or estate) on the execution of the lease (*y*), although as regards its duration (or *terminus a quo*), it commenced at or about the date of the agreement, and before the floodings. The lessees ought, of course, to have refused, under the circumstances, to accept the lease,—the inevitable accidents (the floodings) furnishing them with a good defence to any claim by the lessor for specific performance of the agreement.

EXPRESS POWERS IN SETTLEMENTS.

Usual special mining powers.

The mining powers most usually inserted in settlements are those which will be found in the precedents contained in the appendix to this treatise,—in Division F. of that appendix,—the first of the precedents in that division being that of a power (where the settlement is by deed) for the limited owner when in possession either to work the mines himself, and for that purpose to have the use of the mining plant, or else to lease or sell the minerals ; and the fourth of the precedents being a somewhat similar power (where the settlement is by will) ; and the second and third of the precedents being respectively powers to grant mining leases and powers to grant rights of way ; all which (and the like) express powers ought to be framed with a due and proximate regard to the specific properties comprised in the settlement.

(*x*) (1856), 1 H. & N. 195.

(*y*) *Wyburd* v. *Tuck* (1799), 1 Bos. & P. 464.

EXPRESS POWERS,—EXERCISE OF.

Powers,—care wanted for the due execution of.

And in the exercise of the express power contained in the settlement, great care is to be observed, in order that the power may be duly and properly exercised, and so that no question may aftewards be raised as to its due execution. And, Firstly, as regards the power of leasing, it should be seen that the power extends to the hereditaments proposed to be leased ; and if the power to lease is restricted to the lands which have been "*usually or commonly letten*," lands which have not been demised within the last twenty years might not be within the power,—although a single letting within the twenty years will suffice to bring the lands within the power (*z*). But where the limit is only with regard to the the rent to be reserved, as where it is required that, upon any exercise of the power, regard shall be had to the amount of the rent obtained on "*previous lettings*," in such a case the power may be exercised in respect of all or any of the lands ; and as regards any of the lands that have not been previously let, the limit as to the rent will be inapplicable,—so that, as regards these last-mentioned lands, any rent that is obtainable may be reserved (*a*).

(1) As to lands lettable.

(2) As to rent to be reserved.

Certain portions of the settled land, *e.g.*, the mansion house and the demesne lands held therewith, are usually excluded from the power of leasing ; and sometimes where the power of leasing extends also to the mines within or under these demesne lands, or under or near to the mansion house, the power directs, that in any lease (or sale) of such last-mentioned mines, specific provisions shall be inserted for preventing any damage to the mansion house or to the surface of the demesne lands by subsidence or otherwise ; and all these provisions must, of course, be observed if the power is to be lawfully exercised (*b*).

(3) As to the grant of surface rights.

The terms of the power must also be complied with, so far as the power relates to the grant of surface rights, including the sinking of pits and shafts, and the working by out-stroke (*c*) ; and in these respects, the power is, in general, clear enough ; but if there should be any apparent inconsistency in the terms

(*z*) *Tristram* v. *Baltinglass* (1785), Vaugh. 28.

(*a*) *Winter* v. *Loveday* (1697), Ld. Raym. 261 ; 2 Salk. 537 ; Carth. 428.

(*b*) *Campbell* v. *Leach* (1775), Amb. 748; *Daly* v. *Beckett* (1857), 24 Beav. 114 ; *Clegg* v. *Rowland* (1866), 35 L. J. Ch. 396.

(*c*) *Ricketts* v. *Bell* (1847), 1 De G. & S. 335 ; *Jegon* v. *Vivian* (1865), L. R. 1 C. P. 9.

of the power, the power must, if possible, be construed so as to make all its parts consistent.

(4) As to the duration of term granted;

In accepting a lease made under a power, care must be taken to see that the demise does not exceed the term of years limited by the power; and where the power is to lease for years, a lease for lives would not be a proper exercise of the power; and, conversely, a power to lease for lives would not authorise a lease for years; but the power should be to lease for years or for lives indifferently,—in which latter case, so long as the specified number of lives or the specified number of years is not exceeded, the demise will be valid enough (*d*).

The donee of a power to lease for a specified number of years may, of course, always lease for a shorter period; and if the power be to lease for three lives, he may, of course, lease for two.

and as to the date of the commencement of the term.

With regard to the date as from which the term (or period of the lease) is to commence, there must be a definite term for its commencement (*e*); and, in general, the power of leasing is so expressed as to require that every exercise of the power shall be for a lease in possession and not in reversion, although it occasionally happens, that the power may authorise either a reversionary lease or a future lease,—a future lease being a lease made to commence at a future day and without reference to any subsisting lease or interest; and a reversionary lease being a lease made to begin upon the determination of some prior lease or interest (*f*).

A power of leasing which does not expressly authorise reversionary and future leases will only authorise leases in possession; and a power to lease in possession will by implication exclude a power to lease in reversion (*g*); and a power to lease in reversion as well as in possession may, upon the true construction of it, have a very limited operation indeed (*h*),—although usually it will extend to leases in possession and to leases in reversion indifferently.

Surrender of old lease, —by operation of law.

Where the new lease is made to the person in possession under the subsisting lease, the grant of the new lease will, in

(*d*) *Whitlock's Case* (1608), 8 Rep. 69 b; *Mountjoy's Case* (1584), Moo. 197; *Roe* v. *Prideaux* (1808), 10 East, 158; 5 Rep. 3 b.

(*e*) Co. Litt. 45 b; *Doe* v. *Benjamin* (1839), 9 Ad. & E. 644.

(*f*) *Doe* v. *Calvert* (1802), 2 East, 375; *Clegg* v. *Rowland* (1866), 35 L. J. Ch. 396.

(*g*) *Doe* v. *Harvey* (1823), 1 B. & C. 426; *Marquis of Northampton's Case* (1576), Dy. 357 a.

(*h*) *Winter* v. *Loveday* (1697), 1 Com. 36, *per* HOLT, L.C.J.

general, operate as a surrender in law of the subsisting lease even although not referred to (*i*).

The grant of a new lease to the lessee in possession under an existing lease operates in law as a surrender of the existing lease (*k*),—*scil.*, if it was the intention of the parties that the new lease should take effect in possession: also, the grant of a new lease to any third party, if made with the *assent* of the lessee (or of his assignee) entitled under the existing lease, will operate as a surrender of the existing lease,—assuming that there is a change of possession into the new lessee (*l*),—and not otherwise (*m*).

Reservation of rent,—when without fine.

In all leases, especially in leases granted in exercise of a power of leasing, the rent must be properly reserved; and the taking of any fine, premium, or fore-gift being usually prohibited, and the best rent requiring to be reserved, the best rent must, of course, be reserved,—that is to say, the best rack rent which the landlord can, consistently with securing a substantial tenant, obtain (*n*); and in such a case, the receipt of a fine will be fatal to the lease (*o*). However, the taking of a fine, premium, or fore-gift may be expressly authorised by the power (*p*); and in all cases, apparently, due allowance may be made for any repairs that are to be executed by the tenant (*q*).

Rent,—when the old accustomed rent.

Where the rent directed to be reserved is the antient or accustomed or usual rent, the rent payable at the time of the creation of the power will, in general, be the amount of the rent; and that rent must not be diminished, though it may, of course, be increased (*r*): also, a fine may be taken, if such has been the custom (*s*); and where the custom has been to do so, a proportion of the produce may be reserved by way of rent (*t*),—and which proportion may be made to vary or not with the amount of the minerals gotten (*u*). But under a power requiring

(*i*) *Wilson* v. *Sewell* (1766), 1 Bl. 617.

(*k*) Farwell on Powers, 2nd ed., p. 616.

(*l*) *Davison* v. *Gent* (1857), 1 H. & N. 744; *Baring* v. *Lord Abingdon*, [1892] 2 Ch. 374, at p. 381.

(*m*) *Wallis* v. *Hands*, [1893] 2 Ch. 75.

(*n*) *Doe* d. *Lawton* v. *Radcliffe* (1808), 10 East, 278; *Doe* d. *Rogers* v. *Rogers* (1833), 5 B. & Ad. 755.

(*o*) *Shannon* v. *Bradstreet* (1803), 1 Sch. & Lef. 52.

(*p*) *Muskerry* v. *Chinnery* (1835), Rep. *t.* Sug. 185; *Mountjoy's Case* (1584), Moo. 197.

(*q*) *Doe* v. *Bettison* (1810), 12 East, 308; *Shannon* v. *Bradstreet*, *supra*.

(*r*) *Morrice* v. *Antrobus* (1663), Hard. 325; *Doe* v. *Creed* (1815), 4 Mau. & S. 371.

(*s*) *Right* d. *Bassett* v. *Thomas* (1768), Burr. 1441; *Doe* v. *Creed*, *supra*.

(*t*) *Campbell* v. *Leach* (1775), Amb. 740.

(*u*) *Orby* v. *Mohun* (1705), 3 Ch. Rep. 56; *Lawson* v. *Piggott* (1688), cited 3 Ch. Rep. p. 61.

a reservation of the accustomed rent, one kind of rent may not be substituted for another (*x*),—unless where the custom so authorises: also, where the antient rent is required, any lease will be bad, if it tends to destroy the evidence of the antient rent (*y*). But, although it was at one time considered, that lands not usually leased together, could not be leased together under a reservation of one and the same rent; and that lands usually leased together could not be leased by separate demises, each reserving a proportionable rent,—that minute observation of the custom need not be now regarded,—provided the antient rent be not obscured (*z*): also, several demises may be comprised in one deed,—provided the reservation of the rent in each be kept distinct (*a*).

Re-entry, proviso for, as regards rent.

And, generally, all other the terms and conditions required by the power must be complied with,—as that the lessee shall covenant for the payment of the rent; and that a clause of re-entry shall be inserted, in default of the payment thereof,—which clause of re-entry is also specifically required, in the general case, to extend to any *wilful* breach of any of the covenants and conditions on the part of the lessee contained in the lease (*b*). Also, wherever, as not unfrequently happens, the lessee is required to execute a counterpart of the lease, a counterpart must be executed; and the lessee should obtain a memorandum of its execution to be indorsed on the lease and signed by the lessor (*c*).

EXPRESS POWERS DEFECTIVELY EXERCISED,—WHEN RELIEVED.

Defective leases,—aider of:

The question arises, in what cases the defective execution of powers of leasing will be aided by the courts,—for a lessee, being a purchaser *pro tanto*, is in general relievable. And, firstly, no private lessor will be allowed to repudiate his own lease,—however open to objection on the part of the remainderman the lease may be (*d*). Secondly, an agreement to execute a power of leasing, if it is in accordance with the terms and conditions of the power, and if it is reduced into writing, will be binding

(*x*) *Mountjoy's Case* (1584), Moo. 197.

(*y*) *Coxe* v. *Day* (1810), 13 East, 118; *Doe* v. *Matthews* (1833), 5 B. & Ad. 298.

(*z*) *Doe* d. *Shrewsbury* v. *Wilson* (1822), 5 B. & Ald. 363.

(*a*) *Doe* v. *Rendle* (1814), 3 Mau. & S. 99; *Doe* v. *Matthews*, *supra*.

(*b*) *Doe* d. *Jersey* v. *Smith* (1821), 2 Brod. & Bing. 473; *Doe* d. *Wythe* v. *Rutland* (1837), 2 Mee. & W. 661.

(*c*) Sug. on Powers, 8th ed., 826.

(*d*) *Wentworth* v. *Turner* (1795), 3 Ves. 3; *Blore* v. *Sutton* (1817), 3 Mer. 237.

on those entitled in remainder ; and they will, when necessary, be ordered to execute a formal lease (*e*). And thirdly, where the power purports to be executed by a formal lease, but the instrument is defective in some matter of mere *form*, as opposed to matter of *substance*, the lease will be held good in equity (*f*), —*secus*, if the defect is one of substance (*g*). And where a lease purporting to be made under a power was void for an insufficient execution of the power, the mere acceptance of rent by the remainderman would not have operated as a confirmation of the lease (*h*).

(1) By courts of equity ;

But relief is now, by statute, more largely available in such cases ; for by the 12 & 13 Vict. c. 26, where a lease under any power is invalid by reason of the non-observance or omission of some condition or restriction, or by reason of any other deviation from the terms and conditions of the power, and the lessee has entered, such a lease is to be considered in equity as a contract for a grant (at the request of the lessee) of a valid lease under the contract, except so far as any variation may be necessary under the terms of the power ; and all persons who would have been bound by a lease lawfully granted are to be bound by such contract,—the lessee not, of course, being entitled to any variation if the persons bound by the contract are willing to confirm the lease without variation. And where a lease is invalid by reason that at the time of granting it the lessor could not lawfully grant it, and the estate of the lessor continues after the time when such or the like lease might have been lawfully granted under the power, the lease is to take effect and be as valid as if it had been granted at such last-mentioned date. And where a lease is granted in fact, and there is a power of leasing vested in the grantor, but such power is not referred to in the lease, and (by reason of the determination of the estate of the lessor or otherwise) the lease cannot have effect and continuance independently of the power, the lease is to be deemed to have been granted in exercise of the power. And by the 13 Vict. c. 17, it is declared that, on or before the acceptance of rent under any invalid lease, if any memorandum or note in writing confirming the lease is signed by the person accepting the rent, or his agent, such acceptance

(2) Under the statute 12 & 13 Vict. c. 26;

(3) Under the statute 13 Vict. c. 17.

(*e*) *Campbell* v. *Leach* (1775), Amb. 740 ; *Stiles* v. *Cowper* (1748), 3 Atk. 692.

(*f*) *Cotter* v. *Layer* (1731), 2 P. Wms. 623.

(*g*) *Campbell* v. *Leach*, *supra*.

(*h*) 6 Geo. 4, c. 16, s. 77 ; 7 Geo. 4, c. 57.

of rent shall be deemed to be a confirmation as against the person accepting it; and where during the continuance of the possession under any invalid lease, the person entitled to the hereditaments is able to confirm it without variation, the lessee is bound, at the request of such person, to accept such a confirmation; and the confirmation is to be by memorandum or note in writing signed by the persons respectively confirming and accepting the lease or by their agents respectively.

Powers of leasing, annexed to his estate, will be exerciseable, in general, by any assignee of the tenant,—including the trustee in his bankruptcy or his general assignee (*i*).

STATUTORY POWERS.

Statutory powers of selling and of letting mines.

The statutes under which (and by virtue of the powers thereby respectively conferred) leases and sales of minerals within and under settled land may be made are the Settled Estates Act, 1877, and the Settled Land Act, 1882.

(1) UNDER SETTLED ESTATES ACT, 1877.

(1) Under Settled Estates Act, 1877.

And firstly, under the Settled Estates Act, 1877 (*k*), the court may (in the case of settled land or land deemed settled) authorise a mineral lease, or a way-leave grant (*l*), and also a sale of the settled land (or of any part thereof) (*m*); and upon the sale, there may be excepted any earth, coal, stone, or other mineral, and there may be reserved any rights of working or other rights or privileges (*n*).

And as regards the mineral lease or way-leave grant, the lease or grant will usually be for a term of years not exceeding forty years, but may be for a longer period (*o*); and the rent is to be the best obtainable, but may be either uniform throughout the whole term, or may vary from year to year, and (in particular) may be a nominal or other small rent for the first five years of the term, or for any portion of such five years (*p*); and the rent is to be divided into four equal parts, and one of such four parts (where the tenant in possession is entitled to open new mines) or three of such four

(*i*) *Jones* d. *Cowper* v. *Verney* (1739), Willes, 169; *Doe* d. *Martin* v. *Watts* (1797), 7 T. R. 83; *Doe* d. *Brune* v. *Prideaux* (1808), 10 East, 158; *Doe* d. *Tucker* v. *Morse* (1830), 1 Barn. & Ad. 365.

(*k*) 40 & 41 Vict. c. 18.
(*l*) *Ibid.*, s. 4.
(*m*) *Ibid.*, s. 16.
(*n*) *Ibid.*, s. 19.
(*o*) *Ibid.*, s. 4.
(*p*) *Ibid.*, s. 4.

parts (where he is not so entitled) is to be carried to *capital* account and invested as such, the residue only being treated (and being receivable by such tenant) as *income* (*q*). And, note that the investments of the capital moneys remain land (*r*),—and (where the surface and the minerals are subsequently severed by devise) the investments will go to the devisee of the surface, and not to the devisee of the mines (*s*). The way-leave grant may be either in connection with the mines comprised in the lease, or may be wholly unconnected therewith (*t*) ; also, surface rights incidental to the mineral lease may be granted (*u*).

(2) UNDER SETTLED LAND ACT, 1882.

(2) Under Settled Land Act, 1882.

And secondly, under the Settled Land Act, 1882 (*x*), the tenant for life may (in the case of settled land or land deemed settled) lease the mines (*y*), or sell them (*z*). And the lease may be in the form of a license (*a*), and may be for any term not exceeding sixty years (*b*), or (with the sanction of the court) for a longer term of years (*c*) ; and it may extend to unopened mines as well as to open mines (*d*) : The rent (or royalty) is to be the best obtainable (*e*), but may be either a money rent, an acreage rent, a tonnage rent, or other rent (or royalty) (*f*) ; and it may be a minimum rent, or an uncertain rent, or both a minimum and an uncertain rent, and either uniform or variable (*g*), and either with or without a shorts clause (*h*) ; and the rent is to be divided into four equal parts ; and one of such four parts (where the tenant for life is entitled to open new mines) or three of such four parts (when he is not so entitled) is to be carried to *capital* account and invested, the residue only being treated (and being receivable by such tenant) as *income* (*i*). The sale may be of the surface without the mines, or of the mines without the surface,—and in either case, with or without the grant or reservation of mining rights (including wayleave-rights and other rights incidental to mining) (*k*),—equally as in the case of a mining lease (*l*) : But no sale or

(*q*) 40 & 41 Vict. c. 18, ss. 4, 34.
(*r*) *Ibid.*, s. 34.
(*s*) *In re Scarth* (1879), 10 Ch. D. 499.
(*t*) *In re Lord Wallace's Settled Estates*, W. N. 1869, p. 66.
(*u*) *Morris* v. *Rhyded. Colliery Co.* (1859), 7 W. R. 95 ; 5 Jur. (N.S.) 339 ; *Re Reveley's Settled Estates* (1863), 11 W. R. 744.
(*x*) 45 & 46 Vict. c. 38.
(*y*) *Ibid.*, s. 6.
(*z*) *Ibid.*, s. 3.
(*a*) *Ibid.*, s. 2 (10) (iv.).
(*b*) *Ibid.*, s. 6.
(*c*) *Ibid.*, s. 10.
(*d*) *Ibid.*, s. 2 (10) (iv.).
(*e*) *Ibid.*, s. 7 (2).
(*f*) *Ibid.*, s. 2 (10) (ii.).
(*g*) 53 & 54 Vict. c. 69, s. 8.
(*h*) 45 & 46 Vict. c. 38, s. 9.
(*i*) *Ibid.*, s. 11.
(*k*) *Ibid.*, s. 17 (1).
(*l*) *Ibid.*

mineral lease is to be made by the tenant for life without notice to the trustees of the settlement and to their solicitors (*m*); and when the settled land is subject to a trust or direction for the sale thereof (*n*), the sale or mineral lease must in every case receive the sanction of the court (*o*) ; and in such latter case, three equal fourth parts of the rent is to go to *capital* account, only the remaining one-fourth going to the tenant for life,—at all events where the settled land (although it contains mines) contains none which were open at or prior to the date of the operation of the settlement (*p*).

Express powers and statutory powers,—mutual operation of.

The powers of sale and of leasing which by the Settled Land Act, 1882, are given to the tenant for life are cumulative powers (*q*),—that is to say, are additional to any express powers of sale or of leasing contained in the settlement itself; and these express powers may be expressed to be additional to, or may be larger than the powers given by the Act (*r*). In either of which cases, the powers may (as to their exercise and operation) be regarded as powers given by the Act (*s*); and in the case of any conflict between the provisions subject to which the express powers contained in the settlement are by the settlement declared to be exerciseable, and the provisions subject to which the powers given by the Act are by the Act declared to be exerciseable, the provisions of the Act are to be applicable to the exercise of the power of sale or of leasing (*t*); and the court will in case of any difficulty give its opinion upon the matter (*u*). Therefore, when the settlement gives the trustees a power of sale or of leasing,—not adding with the consent of the tenant for life,—the consent of the tenant for life is necessary, by force of the Act (*x*),—*scil.*, because these are powers which the tenant for life might himself exercise ; and unless the trustees and he were to concur, there might be a "*conflict*" within the meaning of the Act.

IN CASE OF INFANTS.

Infants' settled land.

And as regards the lands of an infant, the general trustees of the settlement, or (if there are none) any trustees for this

(*m*) 45 & 46 Vict. c. 38, s. 45 ; 47 & 48 Vict. c. 18, s. 5 (1) ; 53 & 54 Vict. c. 69, s. 7.
(*n*) 45 & 46 Vict. c. 38, s. 63.
(*o*) 47 & 48 Vict. c. 18, s. 7.
(*p*) *Hellard* v. *Moody* (1885), 31 Ch. D. 504.
(*q*) 45 & 46 Vict. c. 38, s. 56 (1).
(*r*) *Ibid.*, s. 57 (1).
(*s*) *Ibid.*, s. 57 (2).
(*t*) *Ibid.*, s. 56 (2).
(*u*) *Ibid.*, s. 56 (3) ; *In re the Duke of Newcastle's Estates* (1883), 24 Ch. D. 129.
(*x*) 45 & 46 Vict. c. 38, s. 56 (2) ; *Re Clitheroe* (1885), 28 Ch. D. 378; 31 Ch. D. 135.

purpose appointed by the court, may, during the infancy, enter into possession, — and having so entered, may continue the working of mines and quarries (*scil.*, being mines and quarries which have been usually worked) ; but (where the infant is impeachable for waste) they may not commit waste (*y*).

IN CASE OF LUNATICS.

(1) LEASES.

Lunatics' lands,— leases of.

As regards lunatics, as well lunatics so found as also lunatics not so found, leases of their mineral properties may be made under the Lunacy Act, 1890 (*z*),—and as well of open as of unopened mines, and either with or without the overlying surface land or other surface land of the lunatic,—and for such term of years (or number of lives), at such rents and upon such royalties, and subject to such reservations, covenants, and conditions as the judge in lunacy shall approve (*a*). And in the case of a lunatic so found, the committee of his estate executes the lease (*b*) ; and in the case of a lunatic not so found, the person in that behalf authorised by the judge in lunacy, will execute the lease (*c*) ; and for the purposes of any such lease, a surrender of any existing lease may be accepted (*d*). Also, where the lunatic has only a limited estate in the mineral property (that is to say, in the case of settled estates, where the lunatic is only tenant for life or is only tenant in tail), any power of leasing that is vested in him as incidental to his limited estate (including any power of leasing vested in him for his own benefit) may in like manner be exercised (*e*). But where the lease is,—and, *semble*, so far as it is,—of unopened mines (being the property of the lunatic), the rents and royalties are to be deemed or to remain real estate of the lunatic (that is to say, as between his heir and his next of kin) (*f*). And all these observations apply also to leasing powers of the lunatic which are not otherwise vested in him save by the Settled Land Act, 1882 (*g*),—*scil.*, where he would (if of sane mind) be entitled to exercise the powers of a tenant for life under that Act.

Agreements for letting lunatics' mines,—may be sanctioned by the court,

In *In re Mary Smith* (*h*), where three persons were tenants in common of lands containing minerals ; and one of them became of unsound mind, and the two others leased portions of the

(*y*) 44 & 45 Vict. c. 41, s. 42 (2).
(*z*) 53 Vict. c. 5.
(*a*) *Ibid.*, ss. 116, 120, 122.
(*b*) *Ibid.*, ss. 120, 124.
(*c*) *Ibid.*, ss. 116, 124.
(*d*) *Ibid.*, s. 120.
(*e*) *Ibid.*, s. 120.
(*f*) *Ibid.*, s. 123.
(*g*) 45 & 46 Vict. c. 38 ; *In re Salt*, [1896] 1 Ch. 117.
(*h*) (1874), L. R. 10 Ch. App. 79.

minerals (by way of sale and at a price payable by instalments); and afterwards another of them became of unsound mind, and the one of them who then remained of sound mind leased other portions of the minerals (by way of sale and at a price payable by instalments): and subsequently the two lunatics were so found by inquisition,—The court confirmed the leases, and ordered the respective committees in lunacy to execute the indentures of lease,—it appearing to the court that the leases were manifestly for the benefit of the lunatics.

even after the workings have been commenced;

but more usually before the workings have commenced.

And also, in *Ex parte Tabbart* (*i*), where a lunatic was tenant for life of certain lands containing minerals, and he was entitled to open and work such minerals,—but they could not be conveniently or profitably worked save through the pits and shafts of the adjoining owner,—and the committee of the lunatic's estate accordingly entered into an agreement with such adjoining owner for the winning and working of the minerals by means of his (the adjoining owner's) pits and shafts,—the court sanctioned the agreement, being satisfied that it was for the lunatic's benefit. Also, generally, when the lunatic's estate is a mineral estate (just as when it is a timber estate) (*k*), it must be managed under the provisions of the Lunacy Act, 1890 (*l*), or otherwise by virtue of the general jurisdiction of the court in lunacy,—and either by the proper mineral leases or else by the committee's own personal working of the minerals, whether by mining or by quarrying.

(2) SALES.

Lunatics' lands,—sales of.

As regards lunatics, as well lunatics so found as also lunatics not so found, sales of any property belonging to them may be made under the Lunacy Act, 1890 (*m*),—in the case of a lunatic so found, the committee of his estate executing the conveyance (*n*), and in the case of a lunatic not so found, the person in that behalf authorised by the judge in lunacy executing the conveyance (*o*),—and in either case, the sale may be of the surface without the minerals (*p*),—or, *vice versâ*,—the sale having been first sanctioned by that judge. Also, where the lunatic has only a limited estate in the property,—*e.g.*, in

(*i*) (1801), 6 Ves. 428.
(*k*) *Oxenden* v. *Compton* (1793), 2 Ves. 69.
(*l*) 53 Vict. c. 5, ss. 146—118, 120.
(*m*) 53 Vict. c. 5, ss. 116, 120.
(*n*) *Ibid.*, s. 124.
(*o*) *Ibid.*, ss. 116, 124.
(*p*) *In re Dicconson* (1880), 15 Ch. D. 316.

the case of settled estates, where the lunatic is only tenant for life or is only tenant in tail, and, *semble*, even where he has no estate at all in the property,—any power of sale vested in him (being a power vested in him for his own benefit) may in like manner be exercised (*q*). But the sale-proceeds of the property sold (being the property of the lunatic) are to be deemed or to remain of the same quality as the property itself was before the sale thereof (that is to say, as between the heir at law and the next of kin of the lunatic) (*r*). And all these observations apply also to exchanges and partitions, equally as to sales. Also,—but only in the case of lunatics so found (*s*) ;—such sales exchanges and partitions may be effected under and according to the provisions contained in the Settled Land Act, 1882 (*t*), s. 62,—by or on behalf of the lunatic by the committee of his estate, and under the order of the judge in lunacy,—whenever the lunatic is entitled to exercise the powers given by the Act to a tenant for life.

CONTIGUOUS ESTATES.

Distinct but contiguous mineral estates,—necessity for separate leases of.

Where there are two contiguous but distinct mineral properties, and they are settled either by the same instrument (but upon different beneficiaries) or by different instruments,—and the trustees respectively of the two settled properties have powers of selling (or of granting mineral leases of) the respective properties,—it appears that the respective trustees, although they may (at least, under special circumstances) concur in *selling* the two distinct properties at one and the same auction (*u*), yet they may not concur in granting a mineral lease of the two distinct properties, not even where the settlement of both the properties is contained in one instrument and the trustees of both the properties are the same gentlemen (*x*),—*scil.*, because, of course, such a lease would be manifestly prejudicial to the one set of beneficiaries or to the other set, and would involve much complication also in the apportionment of the rents and in adjusting the other rights of the respective beneficiaries ; and all these rules would, *semble*, apply also to the case where the powers of selling and of leasing were given by the Settled Land

(*q*) 53 Vict. c. 5, ss. 116, 120 ; *In re K.*, [1894] 2 Ch. 415.
(*r*) 53 Vict. c. 5. s. 123.
(*s*) *In re Baggs*, [1894] 2 Ch. 416 n.
(*t*) 45 & 46 Vict. c. 38.
(*u*) *Cavendish* v. *Cavendish* (1875), 10 Ch. App. 319 ; *Morris* v. *Debenham* (1876), 2 Ch. D. 540.
(*x*) *Tolson* v. *Sheard* (1876), 5 Ch. D. 19.

Act, 1882,—distinct properties being for this purpose wholly different from undivided shares in the same property (*y*).

Tenant for life, when enittled to the whole rent, as income.

Where the fee simple owner of land (containing mines) leases or agrees to lease the mines reserving dead rents and uncertain royalties,—and then dies, having devised the land to one for life with remainder over,—the tenant for life, although impeachable for waste, is entitled to the whole of the rents and royalties accruing during his life,—especially if the lessees have paid the testator any dead rents before his death, and are also vigorously prosecuting the operations preliminary to reaching the mines (*z*). And in such a case, therefore, no part of the rents or royalties is to be carried to *capital*, as would have been the case, if the tenant for life had himself leased the mines in the first instance; and although the testator's agreement for the mineral lease should require to be (as it may be) (*a*) completed by the lease of the tenant for life, that circumstance will make no difference in the right of the tenant for life to receive the entire rents and royalties for his own benefit (*b*). And the like rule appears to apply also to leases of mines made by the trustees of the will, under an express power to lease the mines,—at all events where the testator has already in his life-time worked or leased any of the mines in the settled land (*c*).

ON SALES (AND LEASES) OF SURFACE LANDS AND OF THE MINERALS APART.

Such sales required special powers.

Under the ordinary power of sale contained in settlements and wills,—where the land was limited to one for life, with remainders over,—if the land or any part of it was sold, it must have been sold without any exception or reservation of the timber on it (*d*), or of the minerals within or under it (*e*). Express powers extending to a sale of the land and minerals apart were therefore necessary; and in the absence of such express powers, it was necessary to proceed,—either under the Settled Estates Act, 1856 (*f*), or under the Confirmation of

(*y*) 45 & 46 Vict. c. 38, ss. 2 (6), 19; *Re Collinge* (1887), 36 Ch. D. 516; *Re Gaitskell* (1889), 40 Ch. D. 416.

(*z*) *Kemeys-Tynte* v. *Kemeys-Tynte*, [1892] 2 Ch. 211; and see *Elias* v. *Griffith* (1877), 8 Ch. D. 521, at p. 532.

(*a*) 45 & 46 Vict. c. 38, s. 12 (i.).

(*b*) *Kemeys-Tynte* v. *Kemeys-Tynte*, *supra*.

(*c*) *Daly* v. *Beckett* (1857), 24 Beav. 114; *Earl Cowley* v. *Wellesley* (1866), 35 Beav. 635.

(*d*) *Cholmondeley* v. *Paxton* (1825), 3 Bing. 207; 3 Russ. 565; 1 Cl. & F. 61.

(*e*) *Buckley* v. *Howell* (1861), 29 Beav. 546.

(*f*) 19 & 20 Vict. c. 120.

Sanction of the court,—is otherwise required.

Sales Act, 1862 (*g*), to obtain the sanction of the court to the sale or to the exchange (*h*). The Settled Estates Act, 1856, enabled the court to sanction the sale of any settled estate with an exception of any "earth, coal, stone, or mineral," and with a reservation of any mining rights or privileges. And under the Confirmation of Sales Act, 1862, all sales of surface land apart from the minerals which had been previously made and had not at the date of the passing of the Act been impeached by any suit were confirmed (s. 1); and every trustee (unless forbidden by the settlement to do so) was authorised to dispose of the settled estate, by way of sale, exchange, partition, or enfranchisement; and in so disposing of the settled estate, to dispose of the surface lands with an exception or reservation of the minerals, and with or without rights and privileges of and incidental to the making, getting, or carrying away of the minerals, and also to dispose of the minerals with or without such rights or powers (s. 2),—the sanction of the court having been first obtained to the sale; and mortgagees (duly serving their mortgagors) were held to be within the provisions of the Act (*i*); and the court might give a general sanction under the Act to trustees having powers of sale and exchange (*k*).

Present law,—divers modes of selling and leasing apart.

Both the last mentioned Acts have now been repealed; and the present law regarding the sale or exchange of minerals without the surface, or of the surface without the minerals, in the case of lands (containing minerals) which are in settlement,—or which are deemed (for this purpose) to be in settlement,—is contained in the following statutes, that is to say: Firstly, the Settled Estates Act, 1877 (*l*); secondly, the Settled Land Act, 1882 (*m*); and thirdly, the Trustee Act, 1893 (*n*),—and the short effect of each of these three Acts may be stated as follows:—

(1) SETTLED ESTATES ACT, 1877,—PROVISIONS OF.

(1) Under Settled Estates Act, 1877.

Firstly, under the Settled Estates Act, 1877,—The court may (paying due regard to the interests of the successive beneficiaries) authorise a mining lease (or a lease of way-leaves or water-leaves)

(*g*) 25 & 26 Vict. c. 108.
(*h*) *Re Mallin's Settled Estates* (1861), 3 Giff. 126.
(*i*) *In re Beaumont's Mortgage Trusts* (1871), L. R. 12 Eq. 86; *In re Wilkinson's Mortgaged Estates* (1872), L. R. 13 Eq. 634.
(*k*) *In re Wynn's Devised Estates* (1873), L. R. 16 Eq. 237.
(*l*) 40 & 41 Vict. c. 18.
(*m*) 45 & 46 Vict. c. 38.
(*n*) 56 & 57 Vict. c. 53.

(*a*) Leases.

for forty years (or, under special circumstances, for a longer term), provided the lease reserve the best obtainable rent or royalty (whether uniform or not), to be made payable half-yearly,—a peppercorn rent being (where proper to be) reserved during the first few years (not exceeding five years) of the term,—and the mineral rent or royalty (although not the way-leave rent or water-leave rent) being divided into four equal parts, whereof one part only is to be paid to the tenant for life, and the three other parts are to be capitalized where the tenant for life could not himself have worked the mines which are demised ; but three-fourth parts are to be paid to the tenant for life, and only the remaining one-fourth part is to be capitalized where he could himself have worked the mines (s. 4) ; and the lease must contain a condition for re-entry, and also all such covenants as (under the special circumstances of the case) are proper (s. 5). And the court may also sanction any contract to grant such lease (s. 8) ; and may either sanction any particular lease or contract for a lease, or may vest in the trustees (or in any other persons) a general power of leasing in conformity with the above provisions of the Act (ss. 10, 13) ; and the sanction of the court is obtained on petition (s. 23), supported by the proper evidence (s. 11).

(*b*) Sales.

The court may also (paying due regard to the interests of the successive beneficiaries) authorise a sale of the settled estates (s. 16) ; and on the sale, any mines may be excepted and mining rights reserved (s. 19) ; and the sanction of the court is obtained on petition (s. 23), and the sale is conducted and is afterwards confirmed like any other sale of land under the decree of the court (s. 16) ; and the net proceeds of the sale are, of course, to be held and applied upon and for the like trusts and purposes, and with and subject to the like provisions (*mutatis mutandis*), as were applicable to the land sold (s. 34).

Limits of the Act.

These powers of the court may be exercised repeatedly,—as often as the occasion shall arise (s. 38) ; and they may be exercised, even although the settlement itself contains express powers of leasing and of selling (s. 38), but not if the settlement expressly excludes the court from exercising them (s. 38) ; and, of course also, the court may not authorise any lease or sale which the settlor himself could not have made or authorised (s. 39).

Validity of lease, or sale.

The lease or sale requires the observance of numerous formalities as to notice, and as to service, and otherwise ; but

the lease or the sale, when once it is completed, is valid notwithstanding any objection on those grounds (s. 40),—a provision which has now been made of wider application, by the Conveyancing and Law of Property Act, 1881, s. 70 (*o*).

(2) SETTLED LAND ACT, 1882,—PROVISIONS OF.

(2) Under Settled Land Act, 1882.

Secondly, under the Settled Land Act, 1882,—Every tenant for life (as defined by the Act), when entitled in possession, may make a lease of the mines for any term not exceeding sixty years (s. 6), provided the best obtainable rent or royalty be reserved (s. 7 (2)) ; and the lease must contain a condition of re-entry (s. 7 (3)) ; and in every such lease, the rent or royalty may be either an acreage or tonnage rent, with or without also a minimum or dead or certain rent or royalty (s. 9), and with or without a provision as to making up short workings (s. 9). And the tenant for life may, under special circumstances and with the sanction of the court, grant a mining lease for a longer term than sixty years (s. 10),—and the sanction of the court may be given either to the particular lease or may be given generally (s. 10). The rent or royalty reserved is to be divided into four equal parts, and one of such parts only is to be paid to the lessor, and the remaining three-fourth parts are to be capitalized, where the lessor is impeachable for waste ; but three-fourth parts are to be paid to him, if he is unimpeachable for waste, only the remaining one-fourth part being in that case capitalized (s. 11). And the powers above-mentioned of the tenant for life extend to completing any contract entered into by the settlor (s. 12, and Settled Land Act, 1890, s. 6), and to complying with any covenant for the renewal of an existing lease (s. 12), and to confirming any voidable lease (s. 12).

(*a*) Leases.

The tenant for life may also *sell* the settled land (s. 3), selling at the best obtainable price (s. 4) ; and on the sale, any restriction or reservation with respect to the mines, or with respect to (or for the purpose of working) the mines, may be imposed (s. 4 (6)) ; and the net proceeds of the sale are to be applied as capital moneys (s. 21).

(*b*) Sales.

The lease or the sale may be made either of the land without the minerals, or of the minerals without the land (s. 17) ; and

(*o*) *Hall-Dare's Contract* (1882), 21 Ch. D. 41 ; *Jones* v. *Barnett*, [1899] 1 Ch. 611.

in either case, with or without the reservation or grant of way-leaves or water-leaves, or other mining rights (s. 17) ; and the tenant for life is authorised to execute the conveyance which is necessary for the completion of the lease or sale (s. 20).

And the powers of leasing and of selling above-mentioned extend to authorising any contract for such lease or sale (s. 31).

Before making the sale or the lease, the tenant for life must give notice of his intention in that behalf to the trustees of the settlement, and to their solicitors (s. 45, Settled Land Act, 1884, s. 5) ; but once the lease or sale is completed, it is valid (s. 54), provided there be no fraud on the part of the lessee or purchaser.

Larger or other express powers,—relation of, to powers under Act.

The powers given by the Act are cumulative (s. 56),—excepting that any express power given by the settlement to the trustees must be exercised by them with the consent of the tenant for life (s. 56 (2)), whether or not such consent is required by the settlement itself,—except in the case of traders' settlements (s. 63, and Settled Land Act, 1884, s. 6 (1)) ; and the Act in no way prevents a settlor from giving larger powers (s. 57 (1)), or from providing that the entire royalties under mining leases shall be paid over to the tenant for life for his own benefit, or shall be wholly capitalized (s. 11).

Mines and mining purposes,—within the Act.

For all the purposes of the Settled Land Act, 1882 (*p*), "*mines and minerals*" mean mines and minerals whether already opened or in work or not, and include all minerals and substances in on or under the land obtainable by underground or by surface working ; and "*mining purposes*" include the sinking and searching for, winning, working, getting and making merchantable or smelting or otherwise converting or working for the purposes of any manufacture, carrying away and disposing of mines and minerals in or under the settled land or any other land, and the erection of buildings and the execution of engineering and other works suitable for those purposes ; and a "*mining lease*" is a lease for any mining purposes or purposes connected therewith, and includes a grant or license for any mining purposes (*q*).

Privileges under the Act,—where

Where a tenant for life (being entitled to do so) is himself working the mines, or is desirous of working them, then (under

(*p*) 45 & 46 Vict. c. 38. (*q*) *Ibid.* s. 2 (10) (iv.).

the Settled Land Act, 1882) (*r*), any capital moneys which are in the hands of the settlement trustees and liable to be invested in the purchase of lands to be settled to the like uses as the settled land, may be paid to the tenant for life (to be applied by him) or may be applied by the trustees,—in or towards paying or repaying the expense incurred in making trial pits for mines, or in making other preliminary works necessary or proper in connection with the development of the mines; and also in or towards paying or repaying the expenses incurred in the re-construction, enlargement, or improvement of such trial pits or other preliminary works,—*scil.*, where the trial pits have become the working pits of the colliery, and the preliminary works have ceased to be preliminary and have become permanent works (*s*); and also in or towards paying or repaying the expenses incurred in the development of a brick-yard or of tile-making works (*t*).

tenant for life is himself working the mines.

(3) TRUSTEE ACT, 1893,—PROVISIONS OF.

(3) Trustee Act, 1893.

Thirdly, under the Trustee Act, 1893 (*x*), s. 44, a trustee authorised to sell land, and under the Trustee Act, 1894 (*y*), any other person authorised to sell land, may, with the sanction of the court (Chancery Division) to be obtained on petition (*z*), (or occasionally on summons) (*a*), sell the surface with an exception of the minerals, or sell the minerals with an exception of the surface,—and in either case, annexing or not annexing to the minerals, rights of working the same (including, *semble*, way-leave rights),—these provisions being a repetition and amendment of the like provisions contained in the Confirmation of Sales Act, 1862, above referred to (*b*).

MISCELLANEOUS ACTS,—PROVISIONS OF.

Sales of surface and of minerals separately,—under divers other Acts.

The surface of settled land may also be sold separately from the mines, where any particular statute so authorises, *e.g.*, upon a compulsory purchase under the Railways Clauses Consolidation

(*r*) 45 & 46 Vict. c. 38, ss. 21, 25 (xix.), (xx.); *In re Mackenzie's Trust* (1883), 23 Ch. D. 750.
(*s*) *In re Mundy's Settled Estates*, [1891] 1 Ch. 399.
(*t*) 45 & 46 Vict. c. 38, ss. 21, 25 (xviii.).
(*x*) 56 & 57 Vict. c. 53.
(*y*) 57 & 58 Vict. c. 10.
(*z*) Order liv*b*., r. 2 (1893).
(*a*) Order lv. r. 2 (14) (1883).
(*b*) *In re Beaumont's Mortgage Trusts* (1871), L. R. 12 Eq. 86; *In re Wilkinson's Mortgage Estates* (1872), L. R. 13 Eq. 634; *In re Hirst's Mortgage* (1890), 45 Ch. D. 263.

Act, 1845 (*c*), or under the Waterworks Clauses Act, 1847 (*d*),—it being an express provision in these Acts, that lands acquired for the railway (*e*) or for the waterworks (*f*) shall be acquired as regards the surface only, that is to say, the lands are acquired without the mines,—unless, of course, the mines are expressly bought up also,—whether at the date of the original purchase or (under the Lands Clauses Consolidation Act, 1845) subsequently to that date (*g*).

ON THE RENEWAL OF LEASES.

In case of leases under powers,—difficulty as to renewals.

A fee simple owner, as he may create whatever lease he pleases, may, of course, grant a lease and covenant therein to grant a renewal of that lease at any time and upon the same terms (as regards rent and otherwise) as the original lease. But when, as very commonly is the case, a mining lease is granted by some limited owner in possession (such as a tenant entitled for his life only), and the lease is therefore granted under the power of leasing annexed to his estate, and is not created out of his own limited estate alone, it has been questioned, whether in the lease created in exercise of the power it is competent for the limited owner to insert a covenant for renewal; and if it is competent for him to do so, then upon what terms the renewal shall be covenanted to be granted, so as not to go beyond (or to be in any respect a fraud upon or a misuse of) the power of leasing.

The difficulty how (in part) obviated.

And it appears, that the covenant for renewal may be validly inserted in such a lease, created by virtue of the power of leasing (*h*); but the covenant must be carefully expressed, so as to bind the covenantor to grant the renewal at such a rent as shall be the best rent (if so required by the power) obtainable at the time when the renewal comes to be actually made, and under and subject to such covenants and provisions on the lessee's part as shall also at that time be the proper covenants and conditions for a due compliance with and due execution of the power,—for otherwise the covenant for renewal will not, in such a case, be enforceable (*i*).

(*c*) 8 & 9 Vict. c. 20.
(*d*) 10 & 11 Vict. c. 17.
(*e*) 8 & 9 Vict. c. 20, s. 77.
(*f*) 10 & 11 Vict. c. 17, s. 18.
(*g*) 8 & 9 Vict. c. 18, s. 6; *Errington* v. *Metropolitan District Rail. Co.* (1882), 19 Ch. D. 559.

(*h*) *Gas Light and Coke Co.* v. *Towse* (1887), 35 Ch. D. 519, approving *Doe* v. *Bettison* (1810), 12 East, 305; *Dowell* v. *Dew* (1842), 1 Yo. & C. Ch. 345; *Shannon* v. *Bradstreet* (1803), 1 Sch. & Lef. 52.
(*i*) *Gas Light and Coke Co.* v. *Towse, supra.*

SPECIFIC PERFORMANCE OF COVENANT, AND DAMAGES FOR BREACH OF.

Specific performance,—none, of a covenant for renewal, which would be a breach of trust, or of duty.

Where the tenant for life, with a power of leasing, has executed a lease, and in the lease he has inserted a covenant to renew the lease on the expiration of the term first granted,—and the terms of the covenant for the renewal are such as amount to a fraud on the power,—the court will not decree the specific performance of the covenant even as against the covenantor,—*scil.*, because the lease would only have the effect of clouding the estate of the remainderman, and a suit might be necessary to remove the cloud; and as regards the covenantor himself, it was better that he should be made liable in damages at once for breach of the covenant to renew, rather than have the question of damages postponed until his death (*k*). However, it rather appears (upon the more recent decisions), that when the covenant for renewal is non-enforceable,—by reason of its not being expressed in due compliance with the terms required by the power of leasing, and the lessee knew the terms required by the power,—the covenantor is not even liable in damages,—or is only liable for nominal damages (*l*); and this is considered to be a result naturally flowing from the principle of the decisions in *Flureau* v. *Thornhill* (*m*) and *Bain* v. *Fothergill* (*n*), that for breach of a contract for the sale of land, only nominal damages are recoverable.

Damages for breach of covenant for renewal,—are they substantial or merely nominal?

RENEWALS,—PERPETUAL.

Perpetual renewal,—right of,—

when it exists, and how proved.

Under the covenant for renewal contained in a mining lease, the right of the lessee may (upon the true construction of the covenant) be either for one renewal only or for any other limited number of renewals, or it may be for a renewal in perpetuity; and the onus is on the lessee to make out, that, on the true construction of the covenant, the right is to a perpetual renewal (*o*),—*scil.*, because if the words of the covenant are at all ambiguous, it cannot be said that the covenantor clearly intended to give (or clearly knew that he was giving) a perpetual right (*p*). In *Iggulden* v. *May* (*q*), it was stated that a covenant for perpetual renewal of a lease, if the right to the renewal

(*k*) *Harnett* v. *Yielding* (1805), 2 Sch. & Lef. 549; and see *In re Farnell's Settled Estates* (1886), 33 Ch. D. 599.
(*l*) *Gas Light and Coke Co.* v. *Towse* (1887), 35 Ch. D. 519.
(*m*) (1776), 2 W. Bl. 1078.
(*n*) (1874), L. R. 7 H. L. Cas. 158.
(*o*) *Iggulden* v. *May* (1804), 9 Ves. 325.
(*p*) *Harnett* v. *Yielding* (1805), 2 Sch. & Lef. 549.
(*q*) *Supra.*

in perpetuity was clearly made out (but not otherwise), would in general be enforced in equity. But this right in perpetuity will not arise by implication, that is to say,—If the covenant to renew contained in the original lease is merely to grant a new lease to include all the covenants contained in the original lease, that will not include,—at least, it will not, in the general case, include,—the covenant for renewal itself, but only the other covenants (if any) contained in the original lease (*r*).

Renewals, on dropping of one or more lives,—when the first lease was for lives.

However, a covenant for renewal may, upon the true construction of the covenant, confer neither the right to a perpetual renewal nor the right to a limited number of renewals,—but it may (*e.g.*, in the case of a lease for lives) confer the right to a renewal as often as any one of the lives shall drop or (at the lessee's option) as often as any two of the lives shall drop, or even (but only in exceptional cases) when all the lives shall have dropped and not sooner (*s*).

An agreement to grant a lease in substitution, is not an agreement to renew.

In *Harnett* v. *Yielding* (*t*), where a lease for twenty-one years at a rent of 85*l.* had been granted, and the lessee had the right (on giving six months' notice) to surrender the lease at the end of any year; and he surrendered it at the end of the first year, upon the ground that the rent was too high by 5*l.*; and thereupon (that is to say, upon such surrender becoming effective) the lessor indorsed upon the lease an agreement to give the lessee a new lease for twenty-one years at a rent of 80*l.*,—the court held, that the indorsed agreement merely intended to grant a new lease in lieu of the surrendered lease, the only object of the parties being to reduce the rent from 85*l.* to 80*l.*; and it was ridiculous on the plaintiff's part to allege, that the agreement gave him any right of renewal for a further term of twenty-one years after the expiration of the first twenty-one years.

Right of renewal where perpetual,—practice as to inserting (or not) the covenant for renewal in each renewal.

Where the right to the renewal is a right in perpetuity, the covenant for renewal is usually re-inserted in every new lease granted pursuant to the right; but where the intending lessors happen to be trustees only (as being, *e.g.*, the trustee-devisees of the deceased fee simple owner), they naturally (and properly enough) object to enter into the covenant,—which (if they did enter into it) would bind them personally; and, in that case, the plan to be adopted is to recite fully the covenant under which

(*r*) *Poore* v. *Foley* (1801), 6 Ves. 232; *Iggulden* v. *May* (1804), 9 Ves. 325.

(*s*) *Swinburne* v. *Milburn* (1884), 9 App. Cas. 844.

(*t*) (1805), 2 Sch. & Lef. 549.

the perpetual right arises,—which recital will give any subsequent purchaser of the fee simple reversion on the lease full notice of the covenant, and the covenant is not, in such a case, required to be again entered into (*u*).

RENEWALS,—CONDITIONAL.

Renewal, right of,—when conditional,—condition must be performed,—

If it should happen,—and it often does happen,—that upon the true construction of the covenant for renewal the right to a renewal is conditional upon the lessee's due performance of the covenants and conditions on his part contained in the original lease, then, of course, a due performance of that condition must be shown in order to entitle the lessee to a renewal; and if there has been a breach of the covenants and conditions on the lessee's part, the lessee (or his assigns) will not be able to enforce the covenant for renewal (*x*).

that is to say, if the condition be a condition *precedent*, but not otherwise.

However, every condition is not a condition *precedent*; and what appears at first sight to be a condition precedent to the exercise of the right to demand a renewal, may be only a term upon which the renewal is to be granted. Thus, in *Nicholson* v. *Smith* (*y*), where the covenant for renewal contained in the lease was to the effect that the lessor would at any time before the expiration of the term, when required by the lessee *and upon the lessee's payment of a specified fine or premium*, grant a new lease, —the court said that the payment of the fine or premium was not a condition precedent, although the request of the lessee was,—and especially so where the property to be leased anew was a mine (*z*).

RENEWALS,—BY TENANT FOR LIFE.

Renewal,—by tenant for life, under Settled Land Act, 1882.

In the case of settled land, where it becomes necessary to grant a new lease under any covenant for renewal,—which covenant is, of course, binding on the settled land,—the tenant for life (who is in possession) may execute the lease (*a*); and that apparently is so, although the lease granted in pursuance of the covenant for renewal is not such a lease as the tenant for life might himself have lawfully made (*b*),—for generally the tenant for life may execute any lease required for giving effect

(*u*) *The Copper Mining Co.* v. *Beach* (1823), 13 Beav. 478.

(*x*) *Finch* v. *Underwood* (1876), 2 Ch. D. 310; *Bastin* v. *Bidwell* (1881), 18 Ch. D. 238.

(*y*) (1882), 22 Ch. D. 640.

(*z*) *Allen* v. *Hilton* (1738), 1 Fonbl. Eq. 432.

(*a*) Settled Land Act, 1882, s. 12 (ii).

(*b*) *Re Kemeys-Tynte*, [1892] 2 Ch. 211.

to the contract of his predecessor in title,—*scil.*, where the contract is binding on the fee simple of the settled land (*c*).

The lease,—or renewal,—must be such as a prudent fee simple owner would make.

A tenant for life who purports to lease under the powers of the Settled Land Act, 1882, is required, in exercising these powers, to have due regard to the interests of all parties under the settlement (*d*); and therefore the lease must not be of a merely factitious or spiteful character (*e*), but must be such a lease as a prudent fee simple owner would make; and this is so, although the motive with which the lease is made is immaterial in itself (*f*).

LEASE BY TENANT FOR LIFE, AND CONFIRMATION BY REMAINDERMAN.

Lease, confirmation of, by remainderman.

Where a lease of mines is made by the tenant for life in possession and by the next remainderman jointly, it is deemed, during the life of the tenant for life, to be the lease of the tenant for life and the confirmation of the remainderman, and after the death of the tenant for life it becomes the lease of the remainderman surviving (*g*). And where at the time of granting such a lease, the remainderman is an infant, he will execute it on his attaining his full age of twenty-one years; but he may also refuse to execute it, not being bound to do so,—although his father (the tenant for life) may have covenanted to procure his (the son's) execution of it. And no expenditure of money by the lessee before the son has attained his age of twenty-one years, upon the faith that the son would in due course execute the lease, will give the lessee any right against the son, to enforce the son's execution of the lease; but if the son, being of age, should say he will execute, and upon the faith of such promise on his part the lessees should afterwards expend money on the demised mines, such expenditure would give them a right against the son to enforce his execution of the lease (*h*).

Expenditure,—incurred on faith of confirmation.

(*c*) Settled Land Act, 1882, s. 12 (i).
(*d*) *Ibid.*, s. 53.
(*e*) *Sutherland* (*Duchess*) v. *Sutherland* (*Duke*), [1893] 3 Ch. 169.
(*f*) *Topham* v. *Portland* (*Duke*) (1869), L. R. 5 Ch. App. 40.
(*g*) Co. Litt. 45 a; Foa, on Landlord and Tenant, 2nd ed. p. 19.
(*h*) *Robertson* v. *St. John* (1786), 2 Bro. C. C. 140.

CHAPTER XI.

ON SALES AND LEASES OF MINES,—AND ON MINING LICENSES.

SECTION I.—*On the Sale of Mines, and on the Specific Performance of the Contract of Sale.*

Conveyances of mines.

WHERE mines are held together with the lands within and under which they lie, they will of course pass with the lands in any conveyance of the lands (*a*),—*scil.*, unless they are excepted out of the conveyance ; but when the mines are owned separately from the surface lands, they form a distinct possession and inheritance, and they require to be conveyed by apt and proper words, and a distinct title to them must be shown.

Mines are capable of livery (*b*) ; and by a grant of mines without livery, the grantee would only have taken a power to dig and work them,—that is to say, a license (*c*) ; but now, by the word "*grant*" (*d*) or by the word "*conveyance*" (*e*), the full estate will pass, without livery.

A distinction was formerly taken between the transfer of opened and of unopened mines,—it being supposed that unopened mines did not admit of livery ; but all unsevered mines, whether opened or unopened, are equally parts of the freehold and inheritance ; and as regards mines which are not accessible, a symbolical seisin may be given (*f*).

EXCEPTIONS.

Exceptions of mines.

Mines are very frequently *excepted* in a conveyance ; and when the exception is contained in a deed, and is (as it usually is) in favour of the grantor himself, there was never any necessity for livery, because the grantor was never out of possession of the thing excepted (*g*) ; nor do any words of limitation appear

(*a*) *Keyse* v. *Powell* (1853), 2 El. & Bl. 132.
(*b*) *Wilkinson* v. *Proud* (1843), 11 Mee. & W. 33.
(*c*) Shep. Touch. 96.
(*d*) 8 & 9 Vict. c. 106.
(*e*) 44 & 45 Vict. c. 41.
(*f*) *Wilkinson* v. *Proud* (1843), 11 M. & W. 33.
(*g*) Co. Litt. 47 a ; *Doe* d. *Douglas* v. *Lock* (1835), 2 Ad. & Ell. 705.

to be necessary in such a case (*h*) ; but when the exception was in favour of third persons, livery was necessary, and (when a deed of *feoffment* is used) would still be necessary ; and the proper words of limitation would also be necessary. And where, in a purchase deed, the mines are not excepted by the usual words of exception, but the purchaser grants to (or covenants with) his vendor, that the vendor, his heirs or assigns, may work and get the mines, it is a question of construction whether the mines are (in effect) validly excepted or not (*i*). The exception, where there is one, should, as regards the parcels described, be as explicit or precise and comprehensive as if the exception were an independent grant (*k*).

Exception,—the true extent of, is a question of construction.

An exception of mines may occur either in a will or in a deed ; but the extent or effect of the words of exception is, in either case, a mere question of construction. Thus, in *Brown* v. *Whiteway* (*l*), under a devise of the pits and veins of clay within and under certain lands which, in an earlier part of the will, were specifically devised (excepting those pits and veins), there being certain pits and veins of clay already open and in work by the lessees thereof at the date of the devise, it was held that the devisee of the pits and veins was entitled (as against the devisee of the lands under which, etc.) only to the pits and veins which were so already open as aforesaid, and could not therefore (as against that devisee) include the unopened veins (or license the opening of new pits) in a renewal of the lease to the old lessees : And the decision appears to have rested upon this, namely, that the devise of the lands, excepting the pits and veins, carried all the mines save only such of them as were included in the exception ; and the exception (which was to be read most strongly against the grantor) did not include (at least not clearly include) any pits or veins save only those already in work by the lessees,—and these latter satisfied the words of the exception. On the other hand, in *Jersey* v. *Neath* (*Guardians*) (*m*), under an exception (contained in a deed) of all mines and minerals whatsoever (other than stone quarries) within or under the lands conveyed by the deed, a bed of brick-earth

(*h*) *Doe* v. *Lawton* (1838), 4 Bing. (N.S.) 455; Co. Litt. 9 b, 273 b; Shep. Touch. 101.

(*i*) *Chetham* v. *Williamson* (1804), 4 East, 469; *Lord Mountjoy's Case* (1584), Godb. 17; 4 Leon. 147; 1 And. 307; Moore, 174; *Ashton* v. *Stock* (1877), 25 W. R. 862; *Hamilton* (*Duke*) v. *Dunlop* (1885), 10 App. Cas. 813; *Sutherland* (*Duke*) v. *Heathcote*, [1891] 3 Ch. 504; [1892] 1 Ch. 475.

(*k*) *Denison* v. *Holiday* (1858), 28 L. J. Exch. 25; 3 H. & N. 670.

(*l*) (1846), 8 Ha. 145, at p. 150.

(*m*) *Jersey* v. *Neath* (*Guardians*) (1889), 22 Q. B. D. 555.

and clay, although unopened at the date of the deed, was held to be excepted,—so that the grantee of the lands (excepting the mines) could not grant to a sanitary authority the right to lay, —and was not entitled to, but the exceptee of the mines was entitled to, the compensation payable by that authority for laying,—a sewer through the bed of earth and clay. That is to say, upon the construction of the grant and of the exception, each being of the fee simple and inheritance, the words of each received their full meaning, there being apparently no open beds of brick-earth and clay to which the exception could be confined, or by which the words of the exception could be reasonably satisfied.

Proviso, intended as an exception, —not sufficiently explicit to be construed as an exception.

In *Ashton* v. *Stock* (*n*), there was an ancient conveyance of land with a proviso as to the coal mines therein and thereunder ; and the proviso was of a difficult character to construe,—amounting (in one view of it) to an exception of the mines to the grantor, subject only to rights in the nature of estovers in the grantee ; but (in another view of it,—the view taken by the court), to no exception at all ; and the plaintiffs derived title under the grantee, and the defendant under the grantor ; and it appeared that the defendant had worked the coal-mines for over twenty years,—and as regards the last six of such twenty years with the full knowledge of the plaintiffs ; and under these circumstances, the court held (1) that the defendant had not acquired the mines adversely to the plaintiffs ; and (2) that he was liable to the plaintiffs for the mining trespass, *i.e.*, for the coals gotten during the six years ; but that (3) he was to be allowed off the value of the coals at the pit's mouth the cost of severance as well as the cost of bringing to bank, or (in other words) both the cost of "hewage" and of "haulage." But the proviso ought, it is submitted, to have been construed as an exception of the coal, subject to a right of estovers in the grantor, the ancient conveyance being in the nature of a copyhold grant.

Minerals,—exception of, on a partition,—construction of, aided by user and other surrounding circumstances.

Upon a partition of lands containing mines, if the mines and minerals are excepted, it may be that the exception comprises all the minerals, as well the surface-minerals as the deep-soil minerals ; but sometimes the exception will not comprise the surface-minerals (such as stone, sand, and gravel), but will be limited to the minerals in the subsoil ; and this limited construction of the exception will be strengthened, if the grantees

(*n*) (1877), 6 Ch. D. 719.

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in severalty of the land have (since the partition) been severally digging and getting, some of them the sand and gravel, and others of them the stone, for their own respective uses,—while the subsoil minerals have either remained ungotten or have been worked and gotten by a third party (*o*).

EXCEPTIONS, IN TERMS OF INCLOSURE ACT, OR OF OTHER ACTS.

Exception of mines, in Inclosure Act,—may arise by implication from the Act.

An exception of mines may also occur (and very often occurs) in an Inclosure Act. And in *Micklethwaite* v. *Winter* (*p*), where the plaintiff was lord of the manor, and the defendant was an allottee of land formerly waste of the manor, but which had been inclosed under a private Inclosure Act ; and the defendant having dug and got stone in his allotment, the plaintiff sued him in trover for the value of the stone gotten ; and it appeared that, by the Inclosure Act, an allotment had been made to the lord for his right of "*soil*" in the common (or waste) *and for the liability he was to come under to the allottees to pay compensation for any damage which he might occasion in digging for and getting the coal and other minerals*,—but, save by implication from the words imposing such liability, the mines and minerals were not excepted to the lord,—the court held, that they were impliedly excepted,—because it was absurd to argue that the mines were the allottee's, seeing that the lord could take them, paying only for the damage done in getting them, but paying nothing whatever to the allottee for the minerals themselves which were gotten.

Exception of mines in terms of Waterworks Clauses Act, —construction of.

In *Glasgow* (*Corporation*) v. *Farie* (*q*), where there was an exception of the mines and minerals "*in terms of the Waterworks Clauses Act*, 1847,"—that is to say, of all "*mines of coal, ironstone, slate, and other minerals*,"—the question was, whether the exception comprised a seam of valuable brick-clay, being, in fact, the common clay which formed the surface soil ; and the court said it did not : What had been purchased by the corporation for the purposes of their waterworks was the *land*,—doubtless the surface-land only, that is to say, the land excepting the minerals ; but the surface-land included (in such a case) the brick-clay, and could not be limited to the vegetable mould ; the decision in *Church* v. *Inclosure Commissioners* (*r*) was to

(*o*) *Darvill* v. *Roper* (1855), 3 Drew. 294.
(*p*) (1851), 6 Exch. 644.
(*q*) (1888), 13 App. Cas. 657.
(*r*) (1862), 11 C. B. (N.S.) 664.

that effect, and ought to be approved: Moreover, the phrase "mines of . . . other minerals" limited the excepted minerals to such as were contained in "*mines*": And, in fact, such surface-minerals as clay, sand, and gravel were reasonably to be deemed as included in the surface-land as purchased, and the value thereof as included in the price paid for the purchase. But, *semble*, a stratum of stone (*i.e.*, limestone) would not be so included, but would be comprised in the exception (*s*), even when it lay close to the surface,—*scil.*, because it is *ejusdem generis* with "coal, ironstone, and slate"; and the company, if they will prevent such a stratum of stone from being worked, must in due course purchase it or such part and parts of it as they choose to prevent the working of (*t*). Also, where the exception was of all "mines of coal, culm, and iron," and of all "*mines and minerals whatsoever, except stone-quarries*," a bed of brick-earth and clay lying close under the surface would be included in the exception, and not in the suface-lands granted (*u*), —a view which is in entire accordance with the definition of minerals in *Hext* v. *Gill* (*x*).

Surface-clay, —not included in exception.

Secus, surface stone.

In *Attorney-General* v. *Welsh Granite Co.* (*y*), where (under the Nevin Inclosure Act, 1812) the mines were excepted to the king as lord of the manor upon the inclosure of the waste,— the exception being of "mines, ores, minerals, coal, limestone, *or matter whatsoever*" within or under the waste; and the Act contained also a proviso (or saving clause) reserving to the lord the "mines, ores, minerals, coal, limestone, *or slate*," and provided that the allottees should have full compensation for surface damage occasioned through the working and getting of the excepted minerals; and it was contended for the defendant company that granite was not included in the exception and reservation, seeing that it was not specifically mentioned as limestone and slate were mentioned,—the court said, that "*granite*" was excepted, although there was granite everywhere throughout the waste, and although (in addition to the exception and reservation of mines) one-twentieth part of the waste had been allotted to the king *in respect of the king's right of soil in the waste*; and the court also said, that the granite might be obtained by quarrying, as well as by mining, the provision for

Exception of *granite* in Inclosure Act,—need not be specific.

(*s*) *Midland Rail. Co.* v. *Robinson* (1889), 15 App. Cas. 19.
(*t*) *Dixon* v. *Caledonian, etc. Rail. Co.* (1880), 5 App. Cas. 820.
(*u*) *Jersey* v. *Neath (Guardians)* (1889), 22 Q. B. D. 555.
(*x*) (1872), L. R. 7 Ch. App. 699.
(*y*) (1887), 35 W. R. 617.

compensation being ample, and agricultural operations being quite compatible with the quarrying of the granite.

CONVEYANCE WITH EXCEPTION,—CONSTRUCTION OF.

Sale of land and of mines to separate purchasers,—and conveyance of both to one, he bargaining and selling the mines to the other,—title to the mines.

In *Low Moss Co.* v. *Stanley Co.* (*z*), where X., a predecessor in title of the plaintiff, and Z., a predecessor in title of the defendant, had agreed to purchase from A. certain land containing mines, and it was agreed that Z. should have the surface and X. the mines; and the land (with the minerals thereunder) was conveyed by A. to Z. in fee simple, and Z. executed a bargain and sale (unenrolled) of the mines to X. his executors, administrators, and assigns; and X. took possession of the mines, and worked two seams, and after ten years ceased working; and after eleven years the plaintiff bought the mines from X. and took possession,—and thereafter the defendant purported to buy the mines from the devisees of Z., and proceeded to work them,—the court said that, assuming the unenrolled bargain and sale to be inoperative altogether, or only to be operative as a tenancy at will, the plaintiff had a title to the mines by adverse possession,—to all the seams, although X. had only entered upon and worked two of them (*a*); but the deed really operated as a license to get the mines, or else created an estate in the nature of a chattel interest, to endure until all the mines were gotten (*b*); and consequently, the workings of the defendant were, in either case, mere trespasses.

INADVERTENT INCLUSION OF MINES IN SALE OF LANDS.

Non-disclosure no fraud,—unless some legal obligation to disclose.

The purchaser of an estate is not bound to acquaint his vendor with the advantages of his estate; therefore if A., knowing there is a mine in the land of B., of which he knows B. to be ignorant, enters into a contract with B. to purchase the land for a price adequate only to the value of the land without the mine, the contract is good enough (*c*). At the same time, very little is required in such a case to exclude or alter the general rule; for if a single word is dropped which tends to mislead the vendor, the

(*z*) (1876), 33 L. T. 436; 34 L. T. 186.

(*a*) *Davis* v. *Shephard* (1866), L. R. 1 Ch. App. 410.

(*b*) *Haigh* v. *Jagger* (1847), 16 Mee. & W. 525.

(*c*) *Fox* v. *Mackreth* (1788), 2 Bro. C. C. 420; *Walters* v. *Morgan* (1861), 3 De G. F. & J. 718.

Concealment of material fact,—a fraud, when?

rule will not be allowed to operate (*d*). And in *Phillips* v. *Homfray* (*e*), where the plaintiff was the owner of a farm ; and adjoining to the farm were certain mineral properties of the defendants (trading as the Tredegar Iron Co.); and in 1859 some negotiations had taken place between the plaintiff and the defendants regarding a proposed lease of the minerals under the farm ; and pending these negotiations, the company drove headings into the last-mentioned minerals (coal) for the purpose of testing them ; and the negotiations having fallen through, the defendants nevertheless continued to work the minerals under the farm, and worked out a considerable quantity of the coal ; and afterwards the plaintiff and the defendants entered into an agreement for a sale to the defendants of the minerals under fourteen acres, portion of the farm, the fact of the interim continued workings of the coal not being then known to the plaintiff,—the court held, that the agreement could not be specifically enforced at the suit of the defendants, the Lord Chancellor observing, that the defendants were, at the time the agreement was entered into, aware of important facts not known to the vendor, *and which ought to have been disclosed to him* ; for if a man has committed a trespass (of a serious character) upon his neighbour's property, and finding it convenient to screen himself from the consequences, makes a proposal for the purchase of that property, he certainly ought to communicate the fact of the trespass,—*scil.*, because otherwise the proposal to purchase is not a simple proposal to purchase, but involves a buying up of rights which the owner has acquired against the purchaser, and of which the owner is not aware.

Mistake,—and misrepresentation,—effect of.

So also an agreement for the sale of land will not be enforced, where the defendant has contracted under a mistake to which the plaintiff has *even unintentionally* contributed (*f*) ; *à fortiori*, where the plaintiff has intentionally contributed to the mistake, or has been guilty of any false representation (*g*). And in *Small* v. *Attwood* (*h*), where the vendor, upon a treaty for the purchase of extensive iron mines and iron works, had made (or had authorised to be made) certain false statements with respect to the cost of manufactured pig iron, and with respect to the

(*d*) *Turner* v. *Harvey* (1821), Jacob, 178.
(*e*) (1871), L. R. 6 Ch. App. 770.
(*f*) *Baskcomb* v. *Beckwith* (1869), L. R. 8 Eq. 100.
(*g*) *Edwards* v. *M'Leay* (1815) Coop. 308; *Lowndes* v. *Lane* (1789) 2 Cox, 363.
(*h*) (1822), 1 You. 407 ; 6 Cl. & Fin. 232 ; and see *Haywood* v. *Cope* (1858), 25 Beav. 140.

conversion of the metal into refined iron, blooms, and rods,—Lord LYNDHURST, C.B., was of opinion, that these misstatements amounted to a fraud, and the contract was rescinded ; but the House of Lords considered, that the misstatements were not sufficiently proved.

SHARES IN COST-BOOK MINE,—SALES OF.

Shares in mine,—sales of.

The subject of the purchase may be not the mines themselves, but some interest in the partnership, association, or company, which is engaged in working the mines ; *e.g.*, the purchase may be only of a share in the company. And as regards shares in a cost-book mining company, the nature of the interest of the shareholder (or co-adventurer) in such a company was considered in *Watson* v. *Spratley* (*i*) ; and it was there held, that such share is not in the general case, an interest in land within the meaning of s. 4 of the Statute of Frauds,—nor yet is it goods within the meaning of s. 17 of the same statute ; but it is, in general, merely a right to participate in the profits made ; and for that purpose, it does not matter, whether the company is an unincorporated company or is a corporate company.

Share in cost-book mine,—title to, on sale.

The purchase of a share in a cost-book mine being therefore very different from the purchase of a share in the mine, the vendor is not required to deduce a title to the mine as to land, but only a title to the share regarded as the share of a purchaser in the business of the mine (*k*),—the title of the partnership to the mine being, *semble*, assumed. In other words, what the vendor of the share is selling is only his own interest as a partner in the partnership mine, the partnership title not being questioned. It appears, however, that the mere production of the entry in the cost-book of the vendor's name as a shareholder in the company is not, without more, sufficient evidence of his title to the share (*l*).

Vendor of share,—entitled to indemnity against calls.

A trustee being entitled, in the general case, to be indemnified by his *cestuis qui trustent* against all liabilities which he necessarily incurs on their behalf,—therefore where by the rules of a cost-book mining company, the registered owner of the shares was, so long as he remained registered in the cost-book, subject to any calls made ; and he sold his shares, and delivered to the

(*i*) (1854), 10 Exch. 222.

(*k*) *Curling* v. *Flight* (1848), 2 Phill. 613.

(*l*) *Ibid.*

purchaser a document addressed to the secretary, requesting the latter to enter in the cost-book a transfer of the shares; but the purchaser (the transfer having been in blank) did not cause the shares to be registered, and the vendor was accordingly compelled to pay certain calls made on the shares after the sale,—It was held, that although the purchaser was not bound to cause the shares to be registered, the blank transfer implying an intention to give him a power of transfer to some third person, yet he (the purchaser) was bound to indemnify the vendor against the consequences of his name having been permitted to remain on the register (*m*).

PURCHASER'S RIGHT TO PROFITS,—DATE OF COMMENCEMENT.

Date as from which purchaser is to take the profits,—must be expressed.

Upon the purchase of a share in a colliery business, the agreement should specify the date as from which the purchaser (paying his purchase money) is to be entitled to the possession, —such possession being, in fact, a mere taking of the proportion (of the profits of the business) which is attributable to the share; and failing any date being specified, there is a doubt, whether the purchaser is entitled as from the first day of the month (or week) in which he purchased when the profits are ascertained monthly (or weekly) (*n*), or only as from the date of the actual completion of his purchase.

Upon a sale by the court,—the confirmation relates back to the day of the sale.

Where the purchase (whether of a colliery or of a share in a colliery) is upon a sale of the colliery or share by the court in an administration action, which sale requires to be confirmed by the court, a considerable interval of time may elapse between the sale and the confirmation; and yet the confirmation, once it is obtained, relates back to the date of the purchase,—so that the purchaser is seriously interested in the intermediate management of the colliery; and accordingly, as regards such purchases, —that is to say, purchases under a decree of the court,—the general rule, whereby the purchaser is (or used to be) let into possession the quarter day next preceding his purchase, and paid his purchase money before the succeeding quarter day (*o*), that rule was held to be inapplicable to the case of a colliery, in which the accounts of the concern are settled monthly (or

(*m*) *Walker* v. *Bartlett* (1856), 17 C. B. 446; 18 C. B. 845; 25 L. J. C. P. 156, 263.

(*n*) *Wren* v. *Kirton* (1803), 8 Ves. 502.

(*o*) *Marfell* v. *Rudge* (1838), 2 You. & C. 566.

weekly), and in which there is no such thing as a quarter day,—*scil.*, because the profits of a colliery may in one quarter year prove more than in the preceding ten years, a colliery being a trade ; and the purchaser of a colliery used therefore to be (and would now be) deemed entitled to the profits from the commencement of the month (or week) in which he purchased, paying his purchase money in the course of that month (or week) (*p*).

REFUSE-HEAPS AND SPOIL-BANKS,—WHEN AND WHEN NOT INCLUDED IN PURCHASE.

On a lease of mines, and a purchase of the "*stores and effects*," —the mine-refuse will not pass, even although of value.

The subject matter of the purchase should be precisely ascertained,—by exact descriptions of the mines purchased, aided by maps of the overlying surface ; and sometimes there must be a specific inclusion of the article which is claimed to be included in the purchase. For example, in *Boileau* v. *Heath* (*q*), where, under a prior lease from the plaintiff to H. of coal and iron mines, large quantities of mine refuse called "tap-cinder" had been deposited on the land, and (being unsaleable) had been accumulated in large mounds ; and the plaintiff then leased the "mines" to the defendant, and afterwards sold to the defendant (who purchased) the "stores and other effects of the mine" left on the land,—the court held, that the defendant was not entitled to the "*tap-cinder*" (or mine refuse) under the demise of the mines, nor yet under his purchase of the stores and effects,—although (by reason of scientific discoveries in the meantime) the tap-cinder had acquired a saleable value, and the defendant had in fact sold it (and claimed to continue selling it).

Spoil-banks and refuse-heaps,—property in.

The property in a spoil-bank, whether erected (as it usually is erected) around the pit mouth or not, is (and remains) in the mining lessee who has created it,—at least, where he is under a duty, at the end of his lease, to fill up the pit, and to remove the spoil bank, and to restore the surface land to its original agricultural condition ; and, consequently, the lessee of the surface, under a lease created subsequently to the mining lease or under a lease whereby the mines are expressly excepted and reserved to the lessor, cannot lawfully appropriate or remove the spoil-bank or any part thereof,—*scil.*, against the wishes or without the permission of the mining lessee (*r*).

(*p*) *Wren* v. *Kirton* (1803), 8 Ves. 502 ; *Williams* v. *Attenborough* (1823), T. & R. 70.

(*q*) [1899] 2 Ch. 301.

(*r*) *Robinson* v. *Milne* (1884), 53 L. J. Ch. 1070.

FIXTURES AND LOOSE PLANT OF MINE.

Fixtures and loose utensils.

The implements, tools, and movable articles of the mine will not be included in a sale of the mine (*s*); but as regards the machinery or *fixtures* of the mine,—these are considered to form part of the mine, and will pass with it (*t*),—and the only difficulty which (in such a case) arises is to determine, whether any specific thing is a fixture or is a mere movable chattel.

Fixtures,—removability of:

(1) As between heir and executor.

And regarding the removability of fixtures properly so called, and their sale or devolution separately from the land or mine, the following points appear to be established, namely,—Firstly, as between an executor or administrator and the devisee or heir,—where the deceased was the owner in fee of the land or of the mine, the devisee or heir will, as a general rule, be entitled to the machinery also which has been annexed to the freehold, and which has become part of the inheritance,—as, *e.g.*, in the case of a salt mine or salt works (*u*); and special circumstances must be shown to alter that rule (*x*); also, where the corpus of any machinery or fixture belongs to the heir or devisee, he is entitled also to all the parts capable of being used in a detached state, if they really belong to it (*y*).

(2) As between tenant for life and remainderman.

But, Secondly, as between the tenant for life and the person entitled in remainder or reversion,—the executor of the tenant for life will, as a general rule, be entitled to the machinery and fixtures. Thus, where a fire-engine for working a colliery had been set up by the tenant for life; and it was proved to be customary to remove such works; but it appeared also that the engine could not be removed without tearing up the soil and destroying the brick-work,—Lord HARDWICKE decided that the engine was part of the personal estate of the late tenant for life, and went to his executor (*z*); and he applied the same rule in a subsequent case to a deceased tenant in tail (*a*).

(3) As between mining lessee and lessor.

And, Thirdly, as between a mining lessee and his lessor, a still greater liberality in favour of the lessee or of his executor prevails (*b*), subject only to this condition, namely, that the lessee or his executor must exercise

(*s*) *Fisher* v. *Dixon* (1845), 12 Cl. & F. 312.

(*t*) *Dudley* v. *Warde* (1751), Amb. 113; *Penry* v. *Brown* (1818), 2 Stark. 403.

(*u*) *Lawton* v. *Salmon* (1782), 1 H. Black. 259.

(*x*) *Lowther* v. *Cavendish* (1758), 1 Eden, 99; *Wood* v. *Gaynon* (1761), 1 Amb. 395; *Lushington* v. *Sewell* (1827), 1 Sim. 435.

(*y*) *Fisher* v. *Dixon*, *supra*.

(*z*) *Lawton* v. *Lawton* (1743), 3 Atk. 13.

(*a*) *Dudley* v. *Warde* (1751), Amb. 113; *Lawton* v. *Salmon* (1782), 1 H. Black. 260.

(*b*) *Grymes* v. *Boweren* (1830), 6 Bing. 439.

his right to remove the fixtures during the continuance of the term, or during what has been termed the excrescence of the term (*c*),—*scil.*, because he will otherwise be considered to have relinquished his claim (*d*).

Special agreements in leases of mines,—as to mine-plant.

However, as between a mining lessee and his lessor, the matter is, in general, regulated by the terms of the lease itself; and where the lessor demised land and salt mines, with power to make warehouses, quays, salt pits, and other works, and a certain rent was reserved for every salt pan then or thereafter to be erected by the lessee, and the lessee covenanted to leave all the buildings, quays, and salt works in good repair,—it was held, that he could not remove any salt pans erected by him (*e*). And where the mining lessee covenanted to leave, at the disposal of the lessor, all the "fixed materials," except the salt pans and other movable articles used at the works; and he afterwards assigned the lease; and the assignees covenanted, in a renewal of the lease, to give up possession of the premises, with all erections, improvements, cisterns, doors, and other fixtures and appurtenances, stipulating only for liberty to take away the salt pans and other articles used,—it was held, that the assignees had a right to take away such fixtures as could properly be called tenant's fixtures (*f*). Also, where a lessee of coal mines and ironworks covenanted to yield up, at the end of the term, all "ways and roads" in good repair, and fit for immediate future use; and certain tram plates and wooden sleepers of the railroads laid down by the lessees were seized under an execution against them,—it was held, that there was a distinction between the rails and sleepers existing at the date of the lease (which might be supposed to pass by the lease) and those procured by the lessees; and that it was not the intention of the lease to bind the lessees to continue for a long term of years the repair of railroads which might have become useless,—the words of the covenant being satisfied by the roads being left in a proper state for the relaying of rails by the lessor (*g*).

(4) As between

In *Holroyd* v. *Marshall* (*h*), where there was an assignment

(*c*) *Heap* v. *Barton* (1852), 12 C. B. 274; *Penton* v. *Robart* (1801), 2 East, 88.

(*d*) *Minshull* v. *Lloyd* (1837), 2 M. & W. 459; *Weeton* v. *Woodcock* (1840), 7 M. & W. 14.

(*e*) *Earl of Mansfield* v. *Blackburne* (1840), 3 Scott (N.S.) 820; 6 Bing. N. C. 426.

(*f*) *Sumner* v. *Bromilow* (1865), 34 L. J. Q. B. 130.

(*g*) *Beaufort* (*Duke*) v. *Bates* (1862), 3 De G. F. & J. 381; 31 L. J. Ch. 481; *Bird* v. *Crabb* (1861), 30 L. J. Ex. 318.

(*h*) (1860), 2 Giff. 382; 2 De G. F. & J. 596; 29 L. J. Ch. 655; 30 *ibid.* 385; 33 *ibid.* 193.

by way of mortgage of the existing machinery and plant, and also a purported assignment of all the machinery and plant which should, during the continuance of the security, be fixed or placed in or about the premises ; and the mortgagor covenanted for the further assurance of such last-mentioned machinery and plant,—the court held, that the after acquired machinery and plant was included in the mortgage. But in *Reeve* v. *Whitmore* (*i*), where the after-acquired machinery and plant did not purport to be assigned,—but the assignment (by way of security) was only of the then existing machinery and plant, a power or license being added to enter and seize the after-acquired machinery and plant,—the court said, that the after-acquired machinery and plant did not pass by the assignment,—*scil.*, without an actual entry and seizure.

mortgagors and mortgagees.

As between trustees in bankruptcy on the one hand and judgment creditors of the bankrupt on the other hand, all the movable chattels of the bankrupt will belong to the trustees ; but there are exceptions to this rule. For it often happens in mining cases, and particularly in the coal trade, that the machinery and plant are demised along with the mine, on specified terms of maintenance and restoration, and (in general) according to a recognised usage of trade ; and in such a case, the movable articles will not be within the order and disposition of the bankrupt, and so will not vest in his trustee (*k*). But although the mortgagee of a mine, with the engines and other fixtures, is, in general, entitled, as against the trustee in bankruptcy, to all the machinery fixed to the freehold (*l*), yet the movable machinery (if any) comprised in the mortgage (unless it falls within such usage as aforesaid) remains in the order and disposition of the bankrupt, and so passes to his trustee (*m*). And his title even to the fixed machinery is commonly disputed, —for although a mortgage of trade fixtures, with the freehold, did not require registry as a bill of sale under the 17 & 18 Vict. c. 36 (*n*),—unless either the trade fixtures were separately assigned (*o*), or there was a power to sever and sell them separately from the freehold (*p*), still the Bills of Sale Acts,

(5) As between trustee in bankruptcy and execution creditor.

(*i*) (1863), 33 L. J. Ch. 63.
(*k*) *Storer* v. *Hunter* (1824), 3 B. & C. 368.
(*l*) *Mather* v. *Fraser* (1856), 2 Kay & J. 536 ; 25 L. J. Ch. 361 ; *Whitmore* v. *Empson* (1857), 23 Beav. 313 ; 26 L. J. Ch. 364.
(*m*) *Whitmore* v. *Empson, supra.*
(*n*) *Mather* v. *Fraser, supra.*
(*o*) *Begbie* v. *Fenwick* (1873), L. R. 8 Ch. App. 1075.
(*p*) *Ex parte Daglish, In re Wilde* (1873), L. R. 8 Ch. App. 1072 ; *Ex parte Barclay, Re Joyce* (1874), L. R. 9 Ch. App. 576 ; *Johns* v. *Ware*, [1899] 1 Ch. 359.

1878 and 1882 (*q*), have now materially altered (or, at least, darkened) the law in these particulars (*r*).

Execution against mining plant, —title of the execution creditor:

The property in goods seized under a *fieri facias* remains in the execution debtor until sale (*s*); but after the seizure, and before the sale, the execution creditor is (as regards these goods) in the position of a secured creditor (*t*). In other words, the writ binds the property in the goods as from the time when the writ is delivered to the sheriff; but no such writ (although so delivered) will prejudice the title to such goods which is acquired from the execution debtor by any purchaser of the goods, who buys in good faith and without notice of the writ having been delivered (*u*),—and that is so, although the execution creditor's security on the goods is thereby destroyed; and all these observations apply, of course, to mining plant, other than what is attached to (so as to pass as part of) the mine itself as realty.

Title under execution debtor.

VENDOR'S TITLE.

Title of vendor,—to mines generally.

A purchaser may or may not be precluded by the contract of purchase from showing *aliunde* that his vendor's title is not a good title (*x*); but where it appears that the purchaser bought the title of his vendor (good or bad), he will not be permitted to prove *aliunde* that the title is bad (*y*).

Purchaser,—may be entitled to compensation, for trivial defect in title.

Where there is a contract for the sale of mines, and a fee simple title thereto in possession is duly made out,—the court will decree specific performance of the contract, notwithstanding that the purchaser may foresee the possibility of his being obstructed in his working and getting of the mines,—as, *e.g.*, where the mines are situate under waste lands (*z*); but the purchaser would, *semble*, be entitled to some compensation for the possibility of disturbance (*a*).

PURCHASE MONEY,—PAYMENT OF.

Payment of purchase money into

Where there is a contract to purchase the coal under an estate, the purchase money being payable by instalments,—if

(*q*) 41 & 42 Vict. c. 31; 45 & 46 Vict. c. 43.

(*r*) *Batcheldor* v. *Yates* (1888), 38 Ch. D. 112.

(*s*) *Giles* v. *Grover* (1832), 1 Cl. & F. 72.

(*t*) *Ex parte Williams* (1872), L. R. 7 Ch. App. 314; *Slater* v. *Pinder* (1872), L. R. 7 Exch. 95.

(*u*) 56 & 57 Vict. c. 71, s. 26.

(*x*) *Else* v. *Else* (1872), L. R. 13 Eq. 196; *Harnet* v. *Baker* (1875), L. R. 20 Eq. 50.

(*y*) *Hume* v. *Pocock* (1866), L. R. 1 Ch. App. 379.

(*z*) *Anon.*, Chan. Sept. 7th, 1803, cited in Sugd. V. & P., 14th ed., 393.

(*a*) *Seaman* v. *Vaudrey* (1809), 16 Ves. 390; *Havens* v. *Middleton* (1853), 10 Ha. 641; and distinguish *Lyddal* v. *Weston* (1739), 2 Atk. 19.

court,—if purchaser in possession.

the purchaser is in possession, and the contract is admitted, and the title not disputed, he will be ordered to pay into court each instalment of the purchase money as it becomes payable,—*scil.*, because he is in possession and is working the mines (*b*); and where there is a contract by the lessees of a coal mine for the purchase of the reversion upon the lease, they will, pending completion of the purchase, be ordered to pay the arrears of rent into court, and the future rent as it accrues due (*c*).

Purchase money,—inspection to ascertain, where to be calculated on the acreage.

Where the plaintiff agreed to sell, and the defendant agreed to purchase, the coal under twelve acres of land, at the rate of 350*l.* per surface acre, to be paid by yearly instalments of 350*l.*, till the whole should be worked out; and it was a term of the agreement, that if more than one acre was got in any one year, the defendant should pay a further proportionate sum for the excess; and the defendant accepted the title, and was in possession and working the mines,—the plaintiff was held entitled to the insertion of a covenant in the conveyance, empowering him and his agents to enter the mines, and to measure the quantity of coal worked in each year,—*scil.*, because such a covenant was usual in leases where royalties were reserved, and the sale of the coal was (in effect) a lease of the coal at a certain rent and an uncertain royalty beyond; and to ascertain the royalty, inspection was a necessary and usual right (*d*),—*scil.*, unless and until the whole purchase money should be paid.

PURCHASE MONEY,—ABATEMENT OF.

Purchaser may be entitled to damages for interim depreciation.

If the property sold become depreciated in value pending the completion of the contract through the delay of the vendor, and the purchaser is free from blame, he (the purchaser) will usually recover damages for the depreciation, in addition to obtaining specific performance of the contract (*e*); and, in fact, the vendor, remaining in the possession (and excluding the purchaser from the possession), is in the position of a trustee for the purchaser (*f*).

(*b*) *Buck* v. *Lodge* (1812), 18 Ves. 450. See *Cutler* v. *Simmons* (1816), 2 Mer. 103.

(*c*) *Robertshaw* v. *Bray* (1866), 35 L. J. Ch. 844; and distinguish *Jowett* v. *Spencer* (1847), 1 Exch. 647; 15 L. J. (N.S.) Exch. 347.

(*d*) *Blakesly* v. *Whieldon* (1841), 1 Hare 176; 11 L. J. (N.S.) Ch. 166.

(*e*) *Brown* v. *Thorpe* (1841), 11 L. J. (N.S.) Ch. 73; *Phillips* v. *Silvester* (1873), L. R. 8 Ch. App. 173.

(*f*) *Clarke* v. *Ramuz*, [1891] 2 Q. B. 456; and see *Brown* v. *Dibbs* (1877), 25 W. R. 776; *Earl of Egmon* v. *Smith* (1877), 6 Ch. D. 469.

Purchaser,—when and when not entitled to take what vendor can give.

Where the contract was for the sale of the fee simple in possession, and the vendor was only entitled for a life estate in possession without any control over the remainder (*g*),—or was entitled only to the remainder with no control over the estate for life in possession (*h*),—and the purchaser contracted in entire ignorance of the title, he was held entitled to a conveyance of all the estate of his vendor, with compensation for the estate to which he had no title.

Where, however, the conveyance of the vendor's life estate in partial execution of his contract to sell the fee simple would be prejudicial to the remainderman, the court is free to decline to direct a conveyance of the life estate (*i*), the purchaser being (in such a case) left to his remedy in damages for breach of the contract; and this is very reasonable, the compensation to be given on a partial performance of the contract, in such a case, being most difficult to ascertain (*k*).

SPECIFIC PERFORMANCE,—AND DEFENCES TO.

Specific performance of contract,—defences to.

The remedy by specific performance of agreements for the sale of mines (as also of agreements for leases of mines) is a purely equitable remedy, the courts of common law having only awarded damages for the breach of such agreements; and the remedy by specific performance being equitable, various defences are open to the defendant, which would not have availed him in an action merely claiming damages for the breach. And of these defences, misrepresentation and material misdescription or mistake are those most frequently put forward; but these two defences will be more conveniently considered when the specific performance of agreements for leases comes to be considered; and it will be sufficient to mention here, that a plaintiff alleging misrepresentation or mistake must make out the misrepresentation or mistake, and the liability of the defendants therefor (*l*). Therefore, in *Jefferys* v. *Fairs* (*m*), where A., on the application of B. and C., agreed to grant them a lease of a vein or seam of coal called the S. vein, "about two feet thick, with the overlying and underlying beds of clay,"

(1) Misrepresentation or misdescription, and mistake.

(*g*) *Barnes* v. *Wood* (1869), L. R. 8 Eq. 424.

(*h*) *Nelthorpe* v. *Holgate* (1844), 1 Coll. 203.

(*i*) *Dering* v. *Thomas* (1837), 1 Keen, 729.

(*k*) *Westmacott* v. *Robins* (1862), 4 De G. F. & J. 390.

(*l*) *Jennings* v. *Broughton* (1853), 22 L. J. Ch. 585; and on appeal, 23 L. J. Ch. 999.

(*m*) (1876), 4 Ch. D. 448; and see *Gowan* v. *Christie* (1873), L. R. 2 H. L. Sc. 273.

under a certain farm called X., at a certain or dead rent, and at certain royalties for the coal and for the clay respectively; and subsequently B. and C. resisted the enforcement of the agreement upon the ground that the S. vein did not exist at all under the farm,—the court held, that what B. and C. had obtained under the agreement was merely a license to enter and search for the vein, but not any warranty of the existence of such vein; and specific performance of the agreement was decreed.

(2) Delay.

The party seeking relief on the ground of mistake or fraud must also come promptly after he has discovered the mistake or fraud (*n*); and he must make his election to proceed, as for the mistake or fraud, immediately he has discovered it, and before he has done anything to waive his remedy (*o*).

Delay of successive owners,—is cumulative.

Where A. purchased an estate from B., the mines under the estate being at the time in lease (under a demise by a predecessor in title of B.); and at the time of the purchase, B. had already disputed the validity of the lease; and A. subsequently commenced an action against the successors in title of the lessee to set aside the lease on the same grounds upon which B. had disputed its validity,—the court said, that B.'s delay was to be added to A.'s delay, and that the combined delay (fifteen years in all) since B.'s right (if any) to set aside the lease had arisen was fatal to the relief claimed,—*laches* being a good defence in all cases, but more especially in a mining case (*p*).

Delay,—accounted for.

The delay may, however, be accounted for; and if it is attributable to the defendant, it will not prevent the plaintiff from obtaining specific performance of the contract (*q*).

No laches without knowledge.

There is, of course, no laches (just as there can be no acquiescence) without knowledge beforehand on the plaintiff's part; and if the facts which entitle the plaintiff to *equitable* relief are not known to him,—and *à fortiori* if they are concealed from him by the positive act or contrivance of the defendant (*r*),—the defence of laches will not be available for the defendant.

Laches,—to bar a *legal* right, must amount to

Also, no laches (and no acquiescence) will avail as against a *legal* right in the plaintiff, unless (together with the knowledge

(*n*) *Ernest* v. *Vivian* (1863), 33 L. J. Ch. 513; *Pollard* v. *Clayton* (1855), 1 Kay & J. 462; *Vigers* v. *Pike* (1839), 8 Cl. & Fin. 562; 2 Dru. & W. 1.

(*o*) *Campbell* v. *Fleming* (1834), 1 Ad. & E. 40.

(*p*) *Ernest* v. *Vivian* (1863), 33 L. J. Ch. 513.

(*q*) *Colby* v. *Gadsden* (1865), 34 Beav. 416; *Haywood* v. *Cope* (1858), 25 Beav. 140.

(*r*) *Phosphate Sewage Co.* v. *Hartmont* (1876), 5 Ch. D. 394.

a *release* of the right.

beforehand) there has been also such conduct on the plaintiff's part as amounts (in effect) to the *release* of the right (*s*) ; for even fraud may be released by conduct after full knowledge, equally as it would be released by the expiration of the full time for bringing the action,—*scil.*, after knowledge of the fraud.

FIDUCIARY PURCHASES.

Fiduciary purchases.

Trustees may not, in general, become purchasers of the mines of which they are trustees ; and the same rule applies also to agents, solicitors, and all others in a fiduciary relation (*t*) ; but, under exceptional circumstances, such purchases may be good : Thus, in *Wren* v. *Kirton* (*u*), where a colliery had been put up for sale under a decree, and 23,000*l.* was offered by a *bonâ fide* bidder ; and that sale having gone off, the property was again put up three successive times, when 12,000*l.*, 12,000*l.* and 6,000*l.* was successively offered for it ; and eventually it was sold to the manager of the colliery for 15,000*l.*,—the sale was upheld.

(1) Generally

Also, the practice of opening the biddings in the case of sales by the court,—which practice had been often reprobated (*x*), and has now been abolished (*y*),—never, it seems, had any application to a sale of mines,—for, as observed by Lord ELDON, "land keeps in general of the same value, but collieries are liable not only to fluctuations in value but to destruction" (*z*).

But a tenant for life, although his consent may be necessary to the exercise of a power of sale by the trustees of the settled land, stands in no fiduciary position towards the remaindermen ; and he is as free as anyone else to buy from the trustees ; and a sale to him cannot be impeached on the ground of the purposes for which he buys,—his motives being immaterial to the trustees, provided they sell on terms advantageous to the estate ; but such a tenant for life purchasing from the trustees is under an obligation to communicate to the trustees what he knows as to the value of the property (*a*).

(2) As between co-purchasers and co-vendors.

Honesty and good faith are required as between co-purchasers and co-vendors. And where therefore one of five purchasers of

(*s*) *Willmott* v. *Barber* (1880), 15 Ch. D. 105.
(*t*) *Lowther* v. *Lowther* (1806), 13 Ves. 95 ; *Woodhouse* v. *Meredith* (1820), 1 J. & W. 204.
(*u*) (1803), 8 Ves. 502.
(*x*) (1823), T. & R. 75.
(*y*) 30 & 31 Vict. c. 48.
(*z*) *Williams* v. *Attenborough* (1823), T. & R. 70.
(*a*) *Dicconson* v. *Talbot* (1870), L. R. 6 Ch. App. 32 ; *Gresley* v. *Mousley* (1859), 4 De G. & J. 78 ; 1 Giff. 450 ; 27 L. J. Ch. 779 ; 28 *ibid.* 620.

a mine had received a bribe in the negotiation for the sale, although the mine was afterwards sold by the purchaser to a company at a price far beyond what it might, without the bribe, have been got for,—It was held that the transaction relating to the bribe was void (*b*). And in a case where A. and B. were the owners of land supposed to contain petroleum, and they agreed with C., that C. should pay them 10,000*l.* for the land if he succeeded in forming a company to work the oil springs and to purchase the property for 13,750*l.*, C. being permitted to keep for himself the 3,750*l.* surplus price ; and A. and B. actively co-operated with C. in the formation of the company, and in procuring the purchase for 13,750*l.*,—the court held, that the contract must be wholly rescinded, the price repaid, and the land reconveyed (*c*).

SPECIFIC PERFORMANCE, WITH COMPENSATION FOR TRIVIAL DEFECTS.

Compensation,—payable for minor defects.

Where the plaintiff elects to keep his purchase, he may,—under certain circumstances,—recover damages for the fraud practised on him, or compensation for the injury he has sustained (*d*),—that relief being in no way inconsistent with his retention of the purchase (*e*).

Where the vendor of an estate containing coal mines had granted the right to work the coal, subject to a proviso that when the workings had finally ceased the pits should be filled up and the land restored to a state of cultivation ; and the coal had been worked, and having ceased to be worked the pits had been filled up and the land restored ; and in that state of circumstances, the contract of sale was entered into ; but an assignee of the mining licensee made a claim to re-open the mines ; and it appeared that the abandonment of the workings had been only temporary,—the court awarded compensation to the purchaser, and directed the amount to be determined by an expert (*f*).

Such compensation,—when recoverable, even after contract of sale completed.

The compensation payable to a purchaser for any such defect as aforesaid will, in general, be recoverable, as well before the contract of sale has been completed, as also after it has been

(*b*) *Beck* v. *Kantorowicz* (1857), 3 Kay & J. 230.

(*c*) *Lindsay Petroleum Co.* v. *Hurd* (1874), L. R. 5 P. C. 221.

(*d*) *Clarke* v. *Dickson* (1858), E. B. & E. 148 ; 27 L. J. Q. B. 223.

(*e*) *Stevens* v. *Guppy* (1828), 3 Russ. 184 ; *Jefferys* v. *Smith* (1826), 3 Russ. 158 ; *Mostyn* v. *West Mostyn Coal and Iron Co.* (1876), 1 C. P. D. 145.

(*f*) *Ramsden* v. *Hurst* (1858), 27 L. J. Ch. 482.

completed,—at least where there is an express condition for compensation (*g*); but in the absence of any such express condition, the compensation can only be recovered before the contract is completed and not afterwards (*h*),—assuming, of course, that there has been no fraud or common mistake in the contract.

SALE OF MINES,—INTERIM MANAGEMENT UNTIL SALE.

Trustees empowered to sell mines,—should have power to postpone the sale, and in the meanwhile to manage and work the mines.

Where mines are vested in trustees or executors, and they have no special powers as to selling or managing them, very grave difficulties arise (*i*),—and the direction of the court must, in such a case, be obtained for the protection of the trustees or executors. And to avoid the expense of the necessary application for such a direction, it is desirable that the testator should give all suitable directions himself. And when a testator directed his executors to continue his business of a coal proprietor during the continuance of a certain mining lease which he held; and he declared that they should not be liable for any loss to his estate, except for wilful neglect; but he omitted to direct that they might employ in the business any part of his estate,—the court held, that no portion of the assets beyond that employed in the business at the time of the death could be used; and as the executors could not continue the business without further capital, they had to go to the court for directions to know what they were to do (*k*).

And the suitable directions are needful as well in the interests of the beneficiaries (*l*), as also for the protection of the executors and trustees themselves (*m*); and also, because the court has not the power, in many cases, of authorising what the exigencies of the property demand,—*e.g.*, a postponement of the sale and conversion of the leasehold mines of the testator (*n*).

(*g*) *Bos* v. *Helsham* (1866), L. R. 2 Exch. 72; *Palmer* v. *Johnson* (1884), 13 Q. B. D. 351.

(*h*) *Clare* v. *Lamb* (1875), L. R. 10 C. P. 334.

(*i*) *Powell* v. *Evans* (1801), 5 Ves. 843; *Raphael* v. *Boehm* (1807), 13 Ves. 410; *Tebbs* v. *Carpenter* (1816), 1 Mad. 298; *Garrett* v. *Noble* (1834), 6 Sim. 504; *Barker* v. *Parker* (1786), 1 T. R. 295; *Ex parte Garland* (1804), 10 Ves. 119; *Wightman* v. *Townroe* (1813), 1 M. & S. 412.

(*k*) *M'Neille* v. *Acton* (1853), 23 L. J. (N.S.) Ch. 11. See also *Fearenside* v. *Derham* (1844), 13 L. J. (N.S.) Ch. 354.

(*l*) *Fletcher* v. *Stevenson* (1844), 3 Hare, 360; 13 L. J. (N.S.) Ch. 202.

(*m*) *Howe* v. *Earl Dartmouth* (1802), 7 Ves. 150.

(*n*) *Dimes* v. *Scott* (1827), 4 Russ. 195; *Fearns* v. *Young* (1803), 9 Ves. 549; *Caldecott* v. *Caldecott* (1842), 1 You. & C. 312; *Douglas* v. *Congreve* (1836), 1 Keen, 410; *Mills* v. *Mills* (1835), 7 Sim. 501; *Meyer* v. *Simonson* (1852), 21 L. J. (N.S.) Ch. 678.

Also, and in order to avoid future disputes between the executors or trustees and the beneficiaries, the testator's direction ought to be workable and explicit; and this will, in general, be best accomplished by specifically devising the colliery or other mineral property, and annexing to the devise all the necessary powers,—for to include it in the ordinary residuary devise is invariably a cause of trouble (*o*).

SECTION II.—*On Mining Leases, and on Mining Licenses,—and on the Specific Performance of the Contract therefor respectively.*

(i.) On mining leases.

THE PARCELS.

Parcels,—careful definition (*i.e.*, description) of.

As regards mining leases generally, that is to stay, whether granted under a power of leasing or created out of and by virtue merely of the estate of the lessor, it is all-important to see that the *parcels* are correctly and accurately defined or described,—the *parcels* being the hereditaments (corporeal and incorporeal) which are comprised in the lease. And when all the mines within certain lands are comprised in the demise, it will, in the general case,—and more particularly in the case of coal mines and the other stratified minerals,—be sufficient to describe the parcels with reference to the surface boundaries; but inasmuch as metals are usually deposited in veins or lodes not corresponding at all with the surface boundaries, all that can be done is to demise all the minerals, or particular veins or known mineral deposits, within certain surface boundaries. And where there is only one mine in operation within the same surface area, little difficulty is experienced; but where there are several, it is different,—for even as regards stratified minerals, it is often exceedingly difficult to ascertain the *identity* of the seam or vein; and the difficulty is often increased by disturbances in the stratification, different strata of coal even getting mixed, an upper stratum on one side of the dyke or fault getting into a much lower position on the other side,—a confusion which very much embarrasses the honest miner, and which lends itself conveniently to the dishonest miner, designing to excuse his fraudulent trespass (*p*).

(*o*) *Lord* v. *Wightwick* (1853), 2 Eq. R. 349; 23 L. J. (N.S.) Ch. 235; *S. C.* (*sub. nom. Wightwick* v. *Lord*), 1 Drew, 576; 4 De G. M. & G. 803; 26 L. J. Ch. 825; 6 H. L. Cas. 217; *Thursby* v. *Thursby* (1875), L. R. 19 Eq. 395.

(*p*) *Davis* v. *Shepherd* (1866), 35 L. J. Ch. 581.

Plan,—in aid of description.

It is usual to describe the subject of demise by reference to a plan ; and when the plan and the descriptions in the lease agree, there is a fair amount of certainty ; but if the plan be incorrect, that is to say, if there be any discrepancy between the boundaries as indicated on the plan and the boundaries as specified or expressed in the descriptions of the parcels as contained in the indenture of lease itself, much uncertainty arises,—sometimes the plan (*q*) and sometimes and more often the descriptions (*r*) prevailing ; but the apparent discrepancy must, if possible, be reconciled (*s*).

Parcels,—comprised respectively in license and in subsequent lease under same area.

In *Carr* v. *Benson* (*t*), there was firstly, a license (non-exclusive) to the plaintiff to work and get the fire-clay (and coal therewith) under specified lands, paying a rent for the fire-clay, but paying nothing for the coal (which coal was only to be used in the fire-brick manufactory demised to the plaintiff in and by the same deed by which the license was granted) ; and there was, secondly, a lease to the defendant of all the coal seams under the same lands, and also of all the seams, veins, or beds of ironstone and of fire-clay found in connection with such coal seams as were workable as coal seams, excepting to the lessor and to his lessees all other the mines not thereby demised ; and the contest between the plaintiff and the defendant was (in effect) as to the parcels comprised in the license and lease respectively ; and the court held (1) that the plaintiff's license being non-exclusive, the lessor could afterwards lease the coal and fire-clay (subject to the license) ; and (2) that the defendant's lease did, in fact, comprise the fire-clay found with the demised coal so far as any demised seam of coal (the fire-clay being worked with it) was "*workable as a coal seam.*"

THE LIBERTIES.

Mining liberties,—grant of express.

A lease of mines carries with it all the rights and incidents which are strictly necessary for the full enjoyment of the mines, but no other rights or incidents ; and all rights, therefore, which are not strictly necessary for the full enjoyment of the mines,—that is to say, for working and getting the mines in the ordinary course of working,—if they are intended to be conferred, must be given or granted in express terms.

(*q*) *Lyle* v. *Richards* (1866), 35 L. J. Q. B. 214.
(*r*) *Taylor* v. *Parry* (1840), 1 Scott, N. R., 576.
(*s*) *Brain* v. *Harris* (1855), 10 Exch. 908.
(*t*) (1868), L. R. 3 Ch. App. 524.

In most cases, it is also very important to acquire special rights of way, and other special rights. And as regards special rights of way,—usually called way-leaves,—these rights are of great value to the landowner ; so much so that in the mining districts, upon any sale or lease of the surface lands excepting the minerals, it is usual to expressly except or reserve a right of way for the landowner and his assigns of the minerals, for the purpose of getting and carrying away the excepted minerals and any adjoining mines.

THE EXCEPTIONS.

Exceptions,—full and careful expression of.

And as regards *exceptions* generally, these (which usually precede the *habendum*) should be set out and described with great particularity,—and with, in fact, the same accuracy as the demised *parcels* themselves are described ; and that is so, whether (upon a sale or lease of the surface) the whole of the minerals are excepted, or whether (upon a sale or lease of the minerals) certain of the minerals are excepted. And it being a general principle applicable to all exceptions, that the exception must not destroy the grant, or (in other words) that the mining operations under the exception of mines must be carried on so as not to interfere with the working of the mines which are demised,—for, otherwise, it would be in the power of the grantor to derogate from the force of his own grant,—therefore any larger powers of working and getting the excepted minerals, —or of using or damaging the surface lands or the buildings thereon,—must be expressly excepted or reserved, and that in the clearest words. And when the value of the mines is beyond the value of the surface (as it usually is), the enjoyment of the surface may be legitimately subordinated to that of the mines ; *e.g.*, in *Aspden* v. *Seddon* (*u*), where the surface was granted on purpose to erect and for ever thereafter to maintain a large manufactory thereon, the words of the mineral exception were so wide and large as to justify even a subsidence of the land involving the destruction of the building,—the surface-owner being, however, entitled to compensation as incident to the exercise of the excepted right (*x*).

THE HABENDUM.

Habendum,—office of.

The *Habendum* in a lease is that part of it which accurately limits or defines the term or estate and interest which is granted

(*u*) (1875), L. R. 10 Ch. 394.

(*x*) *Aspden* v. *Seddon* (1876), 1 Ex. D. 496.

by the lease, whether (in the case of a lease for years) for seven, fourteen, or twenty-one years, the lessee having, in the absence of any express provisions to the contrary, the option at which of the periods the lease shall determine (*y*) ; and the habendum should also express (where there are more lessees than one), whether it is intended they should take as tenants in common, or as joint tenants.

THE REDDENDUM.

Reddendum, — true nature of.

The *Reddendum* in a lease contains the reservation of the rent or rents, and royalty or royalties, which are to be paid by the lessee ; and a reservation is (strictly speaking) of something issuing out of the thing granted, and is not a part of that thing itself, being in this respect distinguished from an *exception* properly so called (*z*) ; but the reservation may well consist of a proportion of the mineral in its smelted or manufactured state (*a*),—or even, *semble*, in its natural state when once severed.

(1) In case of coal mines, and the like.

In leases of coal mines, the render is usually in money ; and, in many instances, is made to vary with the market price of the coal ; and in the north of England, the lease is usually made subject to an annual dead or certain rent, and also to an uncertain or tonnage rent called a ten-tale rent,—a ten measuring about forty-eight tons and a half ; and the lessee pays rent at the specified rate for every ten of coals worked out by him, till he has worked out such a number of tens in the year as to make the payments in respect of them amount to the full certain rent mentioned in the demise ; and he continues thereafter to pay rent at the same rate for every ten which he may afterwards raise in the same year,—so that the annual certain rent is payable to the lessor in any year whether the mine is worked at all or not,—the lessee having, however,—at least in the general case,—the right to make up the short-workings of one year by increased workings in any subsequent year or years ; and in other parts of England, the like system prevails.

(2) In case of metalliferous mines.

On the other hand, in leases of metalliferous mines, the rents are usually proportioned to the quantity of the ore raised, with

(*y*) *Dann* v. *Spurrier* (1803), 3 Bos. & Pul. 399, 442; *Price* v. *Dyer* (1811), 17 Ves. 356 ; *Doe* d. *Webb* v. *Dixon* (1807), 9 East, 16.

(*z*) Co. Litt. 47 a, 142 a.

(*a*) Co. Litt. 142 a.

or without,—and, in the general case, without,—any dead or certain rent in money ; and the ore-rent is called the duty ore or lot ore, and sometimes the lord's dues. But the ore-rent is, by special stipulation, usually made payable either in money according to the market price of the day, or else by delivery of the metal in its manufactured state ; and in demises of lead mines, the reservation usually consists of a certain quantity of smelted lead and of all the silver actually extracted from the ore,—an adequate allowance being made for the expense saved to the lessor in winning and smelting his proportion of the produce (*b*).

THE COVENANTS.

Covenant,—what will amount to?

As regards the *Covenants* in a mining lease,—It appears that no particular form of words is necessary to constitute a valid covenant (*c*) ; and even a recital will be sufficient,—as where in a lease of coal mines it was recited that it had been agreed that the plaintiff should have a third of that dug (*d*) ; and a condition or proviso will also sometimes amount to a covenant (*e*).

Usual covenants,—on lessor's part.

The usual covenants on the part of the lessor are for quiet enjoyment and for further assurance ; and he does not usually covenant for title (*f*) ; but of course the intending lessee should satisfy himself of the lessor's title beforehand ; and the Vendor and Purchaser Act, 1874 (*g*), s. 2, whereby an intended lessee is declared not entitled to call for his lessor's title, unless he expressly stipulate for it, has not relieved the lessee of this very necessary precaution (*h*) ; nor has the like provision contained in the Conveyancing and Law of Property Act, 1881 (*i*), made any difference in this respect.

Covenant on lessee's part not to assign or underlet,—runs with the land.

Where the lease contains a covenant against assigning or under-letting without the consent of the lessor, and the lessee obtains a license to sublet a part, the under-lease should contain the like provision, the consent of the lessee being merely substituted for the consent of the lessor (*k*). The covenant not to

(*b*) *St. Aubyn* v. *St. Aubyn* (1861), 1 Drew. & S. 611 ; 30 L. J. Ch. 917 ; *Bridges* v. *Potts* (1864), 17 C. B. (N.S.) 314 ; 33 L. J. C. P. 338.

(*c*) *James* v. *Cochrane* (1853), 8 Exch. 556 ; *Rowbotham* v. *Wilson* (1857), 8 El. & Bl. 123.

(*d*) *Severn* v. *Clark* (1587), 2 Leon. 122 ; *Sampson* v. *Easterby* (1829), 9 B. & C. 505 ; *Wood* v. *Copper Miners Co.* (1849), 7 C. B. 906.

(*e*) *Doe* d. *Wilson* v. *Phillips* (1824), 2 Bing. 13 ; *Doe* d. *Antrobus* v. *Jepson* (1832), 3 B. & Ad. 402.

(*f*) *Stranks* v. *St. John* (1867), 36 L. J. C. P. 118.

(*g*) 37 & 38 Vict. c. 78.

(*h*) *Patman* v. *Harland* (1881), 17 Ch. D. 353 ; *In re Cox and Neve's Contract*, [1891] 2 Ch. 109.

(*i*) 44 & 45 Vict. c. 41.

(*k*) *Williamson* v. *Williamson* (1874), L. R. 9 Ch. App. 729.

assign or under-let, or not to otherwise part with the possession of the demised premises, without first obtaining the consent of the lessor, is a covenant which runs with the land; and the lessor can therefore sue an assignee of the lease for the breach of it, the measure of damages being such a sum as will,—so far as money can,—put the lessor in the same position as if he had still the whole original responsibility for breaches (both past and future) of all the covenants in the lease (*l*),—many of the original covenants (for example, those relating to the plant and moveable chattels used in the business) not running with the land.

PROVISO FOR RE-ENTRY.

Proviso for re-entry,—

As regards the proviso for re-entry by the lessor, that proviso (equally with the proviso enabling the lessor to give notice determining the lease) (*m*) should be limited to the non-payment of the rent reserved (*n*),—unless under special circumstances, when (in order to get rid of an objectionable lessee) the proviso may be properly made to extend to the wilful breach of any other of the covenants of the lease; but an inadvertent breach ought not to expose the lease to forfeiture (*o*).

(1) Grounds for.

(2) Effect of, upon lease or license.

The proviso for re-entry usually declares, that, on breach of the specified covenant, the lease shall absolutely cease, determine, and become void to all intents and purposes. But it is to be observed, that a freehold lease can only be determined by entry (*p*); and although a lease for years is different in that respect, and may be determined without entry (*q*), still it is well settled in the law, that even in demises for terms of years the proviso for re-entry is not to be construed with the strictness of a common law condition, but that the breach of covenant may be waived (*r*); and in fact the contrary rule would have enabled the lessee to take advantage of his own wrong. Accordingly, where a mining lease was declared to be void on non-performance of any of the conditions, it was held to be only voidable at the option of the lessor (*s*); and so where a license to dig for tin and other ores was granted for twenty-one years, subject to the

(*l*) *Williams* v. *Earle* (1868), L. R. 3 Q. B. 739.
(*m*) *Porter* v. *Shepherd* (1796), 6 T. R. 665; *Friar* v. *Grey* (1848), 17 L. J. Q. B. 301.
(*n*) *Hodgkinson* v. *Crowe* (1875), L. R. 10 Ch. App. 622.
(*o*) *Bowser* v. *Colby* (1841), 1 Ha. 109; *Job* v. *Banister* (1856), 2 K. & J. 374.
(*p*) (1691), Plowd. 135.
(*q*) Co. Litt. 215 a.
(*r*) *Arnsby* v. *Woodward* (1827), 6 B. & C. 519.
(*s*) *Doe* d. *Bryan* v. *Bancks* (1821), 4 B. & Ald. 401.

condition that if the licensee should neglect to work effectually, for any time or times exceeding in any one year of the term six calendar months, the license should be void to all intents and purposes, it was held, that the license was not void, but was voidable only,—and, of course, at the election of the licensor (*t*).

FORFEITURE.

Forfeiture,—waiver of.

The forfeiture of a lease will, in general, be waived by the landlord receiving rent after the occurrence of the event (*u*); but a subsequent act of forfeiture will, of course, give the landlord a new right; and in cases, therefore, where there are continuing acts of forfeiture, a landlord may postpone his remedy to an indefinite period (*x*); and in respect of a continuing act of forfeiture, there is usually no waiver without some positive act (*y*). An agreement to allow further time for the performance of a covenant is not a waiver of the breach, but is at the most a suspension of the forfeiture (*z*),—although, at the same time, the forfeiture may be waived by a parole agreement even (*a*); and acts of negotiation have, in certain cases, been held to amount to a waiver (*b*).

Entry to perfect forfeiture.

An actual entry by the grantor is not in general required to put an end to the estate granted; but any act of the grantor, which would be a trespass if the lease were regarded as continuing, will be considered as tantamount to an actual entry. Therefore, where a license for twenty-one years had been granted to work for tin and other mines, with a proviso for re-entry in case of neglect or failure to effectually work the mines; and the mines were not effectually worked by the licensee; and the grantor of the license subsequently granted the same mines to a third person, who entered and worked them,—Lord TENTERDEN said, that the grantor had a right to re-enter by reason of the breach of covenant in not effectually working the mines; and that acts, which (if done either by the grantor himself or by persons acting under his authority) would be wrongful assuming the license to continue, would be deemed in law an entry by the grantor, and a remitter of him to his

(*t*) *Roberts* v. *Davey* (1833), 4 B. & Ad. 664.
(*u*) *Doe* d. *Ambler* v. *Woodbridge* (1829), 9 B. & C. 376.
(*x*) *Doe* d. *Bryan* v. *Bancks* (1821), 4 B. & Ald. 401.
(*y*) *Doe* d. *Sheppard* v. *Allen* (1810), 3 Taunt. 78.
(*z*) *Doe* d. *Rankin* v. *Brindley* (1832), 4 B. & Ad. 84.
(*a*) *Doe* d. *Henniker* v. *Watt* (1828), 8 B. & C. 308.
(*b*) *Bowser* v. *Colby* (1841), Ha. 109.

former estate by the determination of the grant; and for this purpose, it made no difference whether the estate or interest of the lessee or licensee was a freehold or a leasehold interest (*c*).

(ii.) On mining licenses.

LEASES AND LICENSES,—DISTINGUISHED.

In a license,—no estate in the land passes into the licensee.

In order to ascertain whether an instrument is a lease or is a license, it is only necessary to inquire whether the grantee acquires by it any estate in the land sufficient to support an action of ejectment; for if the land still remains in the possession of the grantor, the instrument amounts to a license only; and though the grantee of the license will be entitled, according to the terms of his grant, to search for and dig mines, and to appropriate the produce thereof to his own use, yet he will acquire no property in the land or in the minerals until they are severed from the land. If a man, says Lord COKE, grants to another to dig turves in his land, and to carry them away at his will and pleasure, the land shall not pass (*d*); and even where the grant was to A., his heirs and assigns, at all times thereafter to enter and search for and dig coal and other minerals, and to carry them away to his (A.'s) own use, the grant was held to be only a license (or liberty) to dig and work the mines (*e*). It will be observed, that in the indenture whereby a license is granted, the indenture, in its granting part, does not purport to demise the land, or the minerals in it, but merely a liberty to dig for the minerals, *and to dispose of those only that shall be found within the term, the grantor parting with no estate or interest in the rest*; and the grantee acquires no estate or property in the land itself, or in any part of the minerals which are not gotten; and a license will not cease to be a license (or become a lease) merely by including in the deed a clause of re-entry,—such a proviso being in itself not less applicable to a license to dig and work for mines than to an actual lease of the mines, because, under such a license, works may be erected and a corporal possession had, which it ought to be competent for the grantor to resume (*f*).

(*c*) *Doe* d. *Hanley* v. *Wood* (1819), 2 B. & Ald. 724.

(*d*) Co. Litt. 4 b; Bacon's Ab. Leases, K.

(*e*) *Chetham* v. *Williamson* (1804), 4 East, 469; 1 Smith, 278; *Norway* v. *Rowe* (1812), 19 Ves. 158.

(*f*) *Doe* d. *Hanley* v. *Wood* (1819), 2 Barn. & Ald. 724.

MINING LICENSES, FORMS OF, AND INCIDENTS OF.

Mining licenses,—form of.

A mining license is usually framed exactly as a lease would be,—and has the same formal parts, including the usual provisoes and covenants (*g*) ; and some precedents of licenses are given in the Appendix,—division D.

Mining license,—incidents of.

There are, however, some important incidents which are peculiar to licenses. And firstly, a license to work mines being a beneficial privilege in land, can only be granted by deed (*h*) ; and it is assignable only by deed (*i*) ; but a license, which does not confer any such interest in the land itself, may be given by parol, that is, without a deed (*k*). VAUGHAN, C.J., in *Thomas* v. *Sorrell* (*l*), observes,—that a license properly "passeth no interest, nor alters or transfers property in anything, but only makes an action lawful, without which it had been unlawful—as a license to go beyond the seas, to hunt in a man's park, to come into his house, or do any other acts which, without license, had been unlawful. But a license to hunt in a man's park and to carry away the deer killed to his own use ; to cut down a tree in a man's ground, and to carry it away the next day after to his own use,—these are licenses as to the acts of hunting, and cutting down the tree, but as to the carrying away of the deer killed and the tree cut down, they are grants."

Licenses pure and simple.

A parol license, when fully executed, cannot be revoked or countermanded ; but so long as it remains executory, it may be revoked ; moreover, such a license is only personal and cannot be assigned (*m*) ; and will not, by the mere expenditure of money, become any the less revocable.

Licenses coupled with an interest.

But a license, where it is coupled with an interest in the land, such as a mining license usually is (*n*), cannot be so

(*g*) *Muskett* v. *Hill* (1839), 7 Scott, 855; 5 Bing. N. C. 694; 9 L. J. (N.S.) C. B. 201.

(*h*) Co. Litt. 9 a ; *Holmes* v. *Sellor* (1791), 3 Lev. 305; *Fentiman* v. *Smith* (1803), 4 East, 107 ; *Hewlins* v. *Shippam* (1826), 5 B. & C. 221 ; *Cocker* v. *Cowper* (1834), 1 Cr. M. & R. 418, overruling *Taylor* v. *Waters* (1817), 7 Taunt. 384. See also *Bryan* v. *Whistler* (1828), 8 B. & C. 288 ; *Liggins* v. *Inge* (1831), 7 Bing. 682; *Wallis* v. *Harrison* (1838), 4 M. & W. 538 ; *Roffey* v. *Henderson* (1851), 17 Q. B. 574 ; 21 L. J. Q. B. 49.

(*i*) *Wood* v. *Leadbitter* (1845), 13 M. & W. 838 ; *Bird* v. *Higginson* (1835), 2 Ad. & E. 696 ; 6 Ad. & E. 824.

(*k*) See *Smart* v. *Jones* (1864), 33 L. J. C. P. 154; 15 C. B. (N.S.) 717; Brooke, Ab. "Licence," pl. 15.

(*l*) (1664), Vaugh. 351.

(*m*) *Winter* v. *Brockwell* (1807), 8 East, 308; *Liggins* v. *Inge*, *supra* ; *Wallis* v. *Harrison*, *supra*.

(*n*) *Wood* v. *Manley* (1839), 11 Ad. & E. 34.

revoked; for as ALDERSON, B., observed in *Wood* v. *Leadbitter* (*o*), a license by parol, coupled with a valid grant, is as irrevocable as a license by deed: and in the license supposed by VAUGHAN, C.J., not only to hunt, but also to take away the deer, when killed, that is in truth a grant of the deer, with a license annexed to come on the land: and assuming the grant of the deer to be good, then the license is irrevocable by the party who gave it, he being estopped from defeating his own grant, or act in the nature of a grant; and if there be the valid grant of a watercourse, with a right or liberty to come on the grantor's land to make and to maintain the watercourse, the license is not capable of being revoked; and the question arising on the construction of the deed would always be, whether the deed amounted to a grant of the watercourse.

LICENSES, EXCLUSIVE AND NON-EXCLUSIVE.

Question,—whether the license is exclusive.

Secondly, upon mining licenses, the question arises whether they are or are not exclusive of the rights of others,—a mining license being, as a general rule, not exclusive. Thus in *Mountjoy's Case* (*p*), where Lord Mountjoy, being seised in fee of the manor of Canford, sold the waste lands of the manor in fee with the reservation of the mines, enforced by a covenant (on the part of the purchaser) that Lord Mountjoy, his heirs and assigns, might dig for ore and turf in the wastes,—the court held, that the purchaser, his heirs and assigns, might dig also in these wastes for ore and turf, the license reserved being non-exclusive. And in *Chetham* v. *Williamson* (*q*), a similar reservation of coals contained in a purchase deed, with a license to dig and get the same, was held not to be an exclusive license,—Lord ELLENBOROUGH observing, that no case could be named where one who had only a liberty of digging for coals in another's soil had an exclusive right to the coals, so as to enable him to maintain trover against the owner of the estate for coals raised by him. And it is abundantly manifest, that an exclusive right to minerals will not necessarily be conferred by the grant of a license to work them.

Non-exclusive licenses,—examples of.

Exclusive licenses,—examples of.

But the license to work may be in such a form as effectually to vest in the grantee the sole and exclusive right to the minerals; and if it appear to be the intention of the deed

(*o*) (1845), 13 M. & W. 838.
(*p*) (1584), Godb. 18; 1 And. 307; 4 Leon. 147.
(*q*) (1804), 4 East, 469.

whereby the license is granted, that the grantee shall be solely and exclusively entitled to work the minerals, the license will be an exclusive one, and the grantor will be precluded from afterwards abridging or derogating from the grant. And when an exclusive license is intended, the apt words should be used,—and they should be inserted in the deed before the habendum, and where the parcels are usually inserted; and, of course, care should be observed to put the effect of the license as an exclusive license beyond all doubt or dispute. For example, the words "full and free liberty" to work will not suffice to make the license an exclusive one (*r*); but there must be some expression adequate to give the grantee the sole and exclusive privilege (*s*). Questions of this nature ought, of course, never to occur in business; and yet they have not infrequently occurred,—and usually with very hurtful consequences (*t*).

LICENSES AND EXCEPTIONS,—DISTINGUISHED.

A license to mine,—is not equivalent to an exception of the mines.

In *Chetham* v. *Williamson* (*u*), one X. had been the owner of the land with the mines thereunder, and had mortgaged same to Z. in fee simple; and afterwards X. and Z. had conveyed the land to the defendant's predecessor in title, subject to a fee farm rent payable to X., his heirs and assigns; and the defendant's predecessor in title had (in the conveyance) covenanted with and also granted to X., his heirs and assigns, liberty to enter and dig the mines, any damage occasioned thereby being deducted out of (or set off against) the fee farm rent; and the title of X. under that liberty had devolved upon and become vested in the plaintiff; and the plaintiff alleged, that, under the liberty of mining so granted, he was sole and exclusive licensee (and in fact owner) of the mines, and he sued the defendant for taking them,—But the court said, the license was not exclusive; and further, that the liberty granted did not amount to an exception of the minerals. But possibly the minerals would now, in such a case, be held to have been well excepted to X. (*x*), the intention to that effect having been reasonably plain,—for what X. and Z. were selling was only the surface land, leaving the minerals in the old ownership, with liberty to get, paying (or allowing) compensation for surface damage.

(*r*) *Doe* d. *Hanley* v. *Wood* (1819), 2 Barn. & Ald. 724.
(*s*) See Appendix of Precedents,—division D.
(*t*) *Sutherland* (*Duke*) v. *Heathcote*, [1892] 1 Ch. 475.
(*u*) (1804), 4 East, 469.
(*x*) *Hamilton* (*Duke*) v. *Dunlop* (1885), 10 App. Cas. 813.

The words proper for the grant of a mining license,—are not the proper words for an exception of the mines.

In *Sutherland* (*Duke*) v. *Heathcote* (*y*), where A. and B. were respectively tenants for life of certain settled lands containing minerals, and were entitled successively,—and they had power to revoke the limitations of the settlement and to appoint the lands otherwise as they might think fit, the power being a joint power; and in 1783, upon an exchange, they appointed the settled lands to C. in fee simple, saving and reserving to themselves in fee simple "full and free liberty to get the coal and minerals which should be found within the lands,"—and the plaintiff (claiming title through or under A. and B.) alleged that the liberty so reserved was either a reservation and exception of the entire minerals, or was (at the least) an exclusive license to get them, and asked that the defendant (who claimed through or under C.) should be restrained from getting (or continuing to get) them,—the court held, that the reservation of "*full and free liberty*," etc., did not amount to an exception of the minerals, and that the license reserved was not even an exclusive license,—and consequently, the defendant could not be prevented from working the minerals, so long as he did not disturb the plaintiff in his exercise of the license. And the court observed, that the lands received from C. upon the exchange were conveyed to A. and B. in fee simple, without any exception of the minerals thereunder or any reservation of mining rights,—a circumstance which was not to be overlooked in the interpretation of the exchange; and the court said, that no one intending to "*except*" the mines and minerals would have expressed his intention so to do by reserving a "*liberty*" to get them; and as regards the "liberty" which was reserved, that was not to be construed as an *exclusive* license, unless (upon the language used) the intention to grant an exclusive license was clear and explicit,—and the words reserving the "liberty" were not clearly and explicitly exclusive.

License to B. to get fire-clay,—and subsequent lease of same fire-clay to C.,—mutual effect of.

In the earlier case of *Carr* v. *Benson* (*z*), where A. had leased to B. for twenty-one years from 1854, a fire-brick manufactory, with liberty to dig and get the fire-clay from under certain specified lands; and subsequently A. leased to C. for forty-two years from 1858 (among other mines) all the mines and seams of coal within or under the same lands and also all "the fire-clay found in connection with such of the coal seams as were workable as coal seams,"—the court held, that B.'s liberty of

(*y*) [1891] 3 Ch. 504; [1892] 1 Ch. 475.

(*z*) (1868), L. R. 3 Ch. App. 524.

getting the fire-clay was not an exclusive liberty or license, so that the grantor of that liberty did no wrong in subsequently leasing the fire-clay to C.; and it appearing that C. was first in possession of the fire-clay in one of the coal seams, the court held that B. was not entitled to restrain him from getting it. And in that case the court observed,—that a man taking a license, when he is under no obligation to work, cannot exclude his licensor from granting as many licenses as he thinks fit, *provided always they are not so granted as to defeat the known objects of the first licensee*; the first licensee, although, of course, he is not to have the whole swept away from him in a body, yet must be content to go on and get what he can in the usual way; *and it is only when he can show that something has been done* by his licensor (or by any subsequent licensee of the licensor) which is, in fact, *in derogation of the first license, that he can rightfully complain.*

LICENSE, TERM OR DURATION OF.

License to mine,—duration of, may depend on construction of ambiguous document, but should not be left to be so dependent;

The term for which a license is granted should be equally well defined as the term of years created by an indenture of lease; for otherwise much difficulty will arise,—especially after the death of the licensee. Thus, in *Haigh* v. *Jagger* (*a*), where J. S. being seised in fee simple of certain lands containing mines purported to grant a license to one A. B. and "*his executors, administators and assigns*" to get the coal within or under the lands, paying 420*l.* for six acres of the coal, and 70*l.* per acre for every acre of coal which should be gotten beyond the six acres; and the license was expressed to be granted *until such time as all the coal should have been gotten*,—the court was in great doubt as to the term for which the license was granted, but inclined to the opinion that the grant operated to pass to A. B. a good chattel interest for such (indefinite) period as should be reasonably required for getting all the coal,—*scil.*, because the grant might either be regarded as a bargain and sale of the coal,—and good without entry; or if it was to be regarded as a grant at the common law, there had been an entry (by A. B. himself) under the grant. And accordingly, the trespass for which the plaintiff sued would (in either case) be excused, the alleged trespass consisting of the getting of the coal by the defendants claiming through or under A. B.'s executors; and

(*a*) (1847), 16 Mee. & W. 525.

the plaintiffs (who claimed through or under J. S.) could only make out their allegation of trespass by showing that the license was limited to A. B. for his life only, which contention appeared rather to be excluded by the words A. B. and "*his executors or administrators and assigns*" occurring in the grant.

and upon the construction, the tenant (or licensee) may be but a yearly tenant.

In *Re Stroud* (*b*), by an agreement in writing, A. agreed to let (and B. to take) a certain field containing brick-earth, and on which there was a cottage, and to pay 10*l.* a year as rent for the cottage, 5*l.* per acre per year as rent for the surface of the land, and 3*s.* per 1,000 bricks made as uncertain (or royalty) rent in respect of the brick-earth taken and used up; and the agreement provided, that B. (Stroud) should make 4,000,000 bricks annually,—so that the royalty would be 4,000 times 3*s.* (or 600*l.*) per annum; but there was nothing in the agreement which defined the term for which the tenancy was to continue, or which obliged the tenant to get all the brick-earth; nor did the agreement intend that any further or more formal agreement should be entered into,—and the court held, that B. was only entitled as a tenant from year to year; and a railway company having compulsorily acquired the land, B. was entitled to compensation therefor on the footing of a yearly tenant only.

LICENSE, RESERVATIONS AND COVENANTS IN.

No rent proper can be reserved on a license.

No rent can properly issue out of an incorporeal hereditament, —*scil.*, because such hereditaments are incapable of being distrained upon (*c*),—unless by the crown (*d*); but the purported reservation of the rent will be good by way of *contract* (*e*), although not good as a *reservation*.

Covenants may run with the land,—in license, equally as in lease.

And it appears, also, that a covenant will run with the land, in the case of a license, equally as in the case of a lease; and, where in *Norval* v. *Pascoe* (*f*) three licensees jointly and severally covenanted for the payment of compensation for surface-damage, and two of them assigned their interests, the assignee was held liable on the covenant,—a decision the principle of which has been extended to the case of a licensee in fee simple, in respect of the damage done by himself or his lessees of the mines in the exercise of the liberties conferred

(*b*) (1849), 8 C. B. 502; 19 L. J. (N.S.) C. P. 117.
(*c*) Co. Litt. 47 a, 142 a, 144.
(*d*) *Ibid.*, 47 a; (1589), 5 Co. Rep. 4, 56.
(*e*) *Dalston* v. *Reeve* (1696), Ld. Raym. 77.
(*f*) *Norval* v. *Pascoe* (1864), 34 L. J. Ch. 83, following *Martyn* v. *Williams* (1857), 1 H. & N. 817.

by the license (*g*). Also, where there is a parol license to dig brick-earth and to make bricks, subject to certain periodical payments, the payments are in the nature of rents, and will pass with the land (*h*).

The rent reserved on a license,—runs (in effect) with the license.

In *Lord Hastings* v. *North Eastern Rail. Co.* (*i*), where a predecessor in title of the plaintiff had granted to a predecessor in title of the defendants a right of way-leave over his (the plaintiff's) land, subject to the purported reservation of a way-leave rent,—the court regarded the position as analogous to that of the licensee in *Norval* v. *Pascoe*, *supra*,—and said (in effect) that the *quasi* relation of reversioner and tenant existed in the case. And it appearing in that case that the reservation of rent was to the "*heirs and assigns*" of the licensor, and that the rent was payable in respect even of minerals carried by the defendants, although not over the line of railway which had been constructed under the way-leave grant, the court said (in effect) that the rent accompanied the ownership of the land over which the way-leave had been granted, and went to the plaintiff accordingly, and not to the executors or administrators of the original licensor or grantor of the way-leave.

Reddendum, —true effect of, a question of construction, in license as in lease.

The effect of the *reddendum* in the case of a license is, of course, purely a question of construction,—equally as it would be in the case of a lease ; and where, in *Great Western Rail. Co.* v. *Rous* (*k*), the owner of certain land containing mines leased part of the land (and the mines under it) to an iron company, the company "yielding and paying to the lessor for every quantity of 2,520 lbs. of coal, ironstone, etc., the produce of any lands or mines not included in the demise, but which should be raised within the distance of twenty miles from any part of the premises demised, and which should, under the liberty or license in that behalf granted by the lease, be brought *through*, *over*, or *under* the said land, the royalty or sum of one halfpenny,"—and the company granted an under-lease of part of the surface of the demised land to a railway company, and the railway company made sidings thereon for the purpose of more conveniently and safely shunting trains before forwarding them to their destination ; and it was proved that trains containing minerals raised within the twenty miles were, for safety

(*g*) *Portmore* v. *Bunn* (1823), 1 Barn. & C. 694 ; *Aspden* v. *Seddon* (1876), 1 Ex. D. 496.
(*h*) *Ex parte Hankey* (1829), Mont. & M. 247.
(*i*) [1898] 2 Ch. 674 ; (1899), 1 Ch. 656.
(*k*) (1870), L. R. 4 H. L. 650.

and convenience, shunted for a time on the sidings, and afterwards forwarded to their destination,—it was held, that the minerals so raised within the described distance, and so brought on the land, although only for the temporary purpose of being shunted there, were liable to the payment of the royalty, as falling within the words of the *reddendum*.

(iii.) Leases and licenses,—specific points upon.

Having now stated somewhat generally the form and contents of mining leases (including licenses), it will be convenient to proceed to consider with some detail the law relative to the rents reserved by and relative to the covenants and to the other provisions contained in the lease (or license).

(*a.*) RENTS AND ROYALTIES.

Rents in mining lease,—when not rents, but instalments of purchase-money;

In a mining lease,—and more especially in a coal lease,—the rents and royalties are (in substance) the price of the coal (or other mineral) regarded as purchased by the lessee; and sometimes, as where a principal sum is declared payable for the coal demised, and that sum is made payable by instalments extending over (say) twelve years (the term of the demise itself being of longer duration, say, ninety-nine years), the instalments (although expressly made distrainable for as rents) have been held to be not rents at all, but merely personal debts (*l*).

and when rents properly so called, although instalments of a fixed capital sum.

However, more usually, the rents and royalties, even when described as consideration money, or even as purchase money, for the mines, would be rents incident to (and passing with) the reversion upon the demise (*m*), and not personal debts at all. And this distinction between rent and purchase money has certain important consequences. Thus,—

Rent and purchase money payable by instalments,—distinguished.

(1) Where no reddendum.

In *Lord Hatherton* v. *Bradburne* (*n*), where A. and B. were seised in fee simple in equal moieties of certain lands and mines; and they sold and conveyed the mines to H. for ninety-nine years, and demised the surface to him for ninety-nine years; and the demise of the surface reserved a rent of 110*l.* to A. and B. and their respective heirs; but the sale and conveyance of the mines reserved no rent *eo nomine*, but provided only that H. should pay to A. and his executors or administrators a specified large sum of money for his moiety of the

(*l*) *Hatherton* v. *Bradburne* (1843), 13 Sim. 599; *Foley* v. *Fletcher* (1858), 3 H. & N. 769.

(*m*) *Barrs* v. *Lea* (1864), 33 L. J. (N.S.) Ch. 437.

(*n*) (1843), 13 Sim. 599.

mines, and should pay to B. and his executors or administrators a like sum for his moiety of the mines,—the payment being directed to be made by equal half-yearly instalments extending over the first ten of the ninety-nine years, or until the full amount of the purchase money should have been sooner paid,—the court said, that the instalments were not *rents*, passing with the reversion to the respective heirs and devisees of A. and B., but were purchase moneys properly so called and payable to the respective executors of A. and B.,—although the surface payment of 110*l.* per annum was properly rent and went with the reversion. And in *Taylor* v. *Evans* (*o*), where, in the demise of a coal mine for fifty years, there was no *reddendum* (at least none *eo nomine*), but a lump sum of X*l.* was expressed to be the consideration for the grant; and such lump sum was payable by yearly instalments at the rate of 100*l.* per acre of the coal gotten in each year until the whole lump sum was paid; and it was expressed that at the least 150*l.* per annum should be paid until the whole lump sum was paid,—the instalments were not regarded as rent. Also, in *Foley* v. *Fletcher* (*p*), where on a sale of lands and mines in fee simple, the purchase money was payable as to part thereof at once, and as to the residue thereof by equal half-yearly instalments until the whole residue was paid; and there was no *reddendum* of the instalments, but merely a covenant to pay them,—the court said that the instalments were not rents, nor yet profits, but were mere debts (representing postponed payments of the purchase money).

(2) Where a reddendum.

However, in *Barrs* v. *Lea* (*q*), where A., in consideration of 250*l.*, demised to B. for thirty years certain lands with the mines thereunder, at a yearly rent of 40*l.* for the surface, and in respect of the mines "yielding and paying" to A., his heirs, and assigns, for every year of the first ten years, or until the full sum of 5,000*l.* was sooner paid, the "further consideration money or sum of 500*l.*,"—the court said that the 500*l.* a year was rent, and (A. having died intestate) went with the reversion to his heirs.

INSPECTIONS, TO ASCERTAIN RENT PAYABLE.

Sale of mine, at 350*l.* per acre—right of

In *Blakesley* v. *Whieldon* (*r*), where the plaintiff agreed to sell (and the defendant to purchase) all the coal mines under

(*o*) (1856), 1 H. & N. 101.
(*p*) (1858), 3 H. & N. 769.
(*q*) (1864), 33 L. J. Ch. 437.
(*r*) (1841), 1 Ha. 176.

vendor to inspect, in order to see the acreage from time to time gotten.

certain specified surface lands containing about twelve acres, at or for the price of 350*l.* per acre ; and the agreement was that 350*l.* should be paid at once for one acre, and 350*l.* at the end of every year until the whole twelve acres should be paid for,—together with (in any one year) the proportion of 350*l.* for any excess beyond the acre of coal worked in that year ; and it appeared that the defendant was working adjoining mines, and might thereby work and get the demised mines without sinking any shaft through the surface of the demised mines,—the court directed that in the lease which was to be executed for specifically performing the contract, there should be inserted (as a *usual* clause, and as a matter *incidental* to the rights of the plaintiff under the agreement) (*s*) a power for the plaintiff to enter, inspect, and measure from time to time, for the purpose of ascertaining the quantity of minerals from time to time gotten until the whole twelve acres were paid for, *but for no other purpose*. Because, generally, in all cases where the plaintiffs are lessors of mines, and the defendants (their lessees of the mines) are working the demised mines, and the plaintiffs are suing them for a wrongful extension of their workings into other mines of the plaintiffs not demised, the plaintiffs may, of course, have an order permitting them to inspect the workings ; and where the workings are wholly by means of a shaft or shafts in adjoining mines, the order for inspection will extend to requiring the defendants to permit the plaintiffs to have entry and inspection through the adjoining mines (*t*),—and this is by virtue merely of the practice of the court ; and it does not (for that purpose) matter, whether the lease contains or not a clause entitling the lessors to inspect the workings ; but the court will insert in the order for inspection the necessary safeguards (*u*).

Inspection of workings,—in case of alleged trespass.

RENTS, PAYABILITY OF, EFFECT OF "SHORTS" CLAUSE UPON.

Dead (or certain) rent,—effect, (1) when no "*shorts*" clause ;

Where in a lease of mines, the reservation was of 37*l.* 10*s.* per quarter, whether that amount of coal was gotten or not in the quarter year ; and the lease provided for a royalty on any excess quantity of coal gotten in any quarter beyond what was represented by the royalty of 37*l.* 10*s.*, but contained no

(*s*) *Henderson* v. *Hay* (1792), 3 Bro. C. C. 632 ; *Church* v. *Brown* (1808), 15 Ves. 258.

(*t*) *Lewis* v. *Marsh* (1849), 8 Ha. 97.

(*u*) *Ibid.*, at p. 100.

provision for making such excess go against any deficiency in a subsequent quarter year,—the court held that the 37*l.* 10*s.* at the least was payable every quarter year, whether or not more than that amount had been paid (under the name of royalty) for any previous quarter year (*x*). The omitted provision (commonly called the provision for making up "*shorts*") is, however, generally inserted in all leases of coal; and it is either limited to a specified number of years, or is available during the whole continuance of the lease; but it is usually limited; and it is to be strictly construed in all cases (*y*); and, of course, it always leaves the dead or certain rent payable.

(2) where a "*shorts*" clause.

RENTS, CONTINUED PAYABILITY OF, UNDER CIRCUMSTANCES OF HARDSHIP.

Although, as a general rule, a contract for the *sale* of a non-existing thing is not enforceable, a contract for the lease of a vein or seam of coal (or of coal and fire-clay) may (and often does) amount only to a contract for a license to search for the seam or vein, and (if found) to work and get it and carry it away; and where that is the case, the contract is enforceable (*z*),—for the lessor (or licensor) does not warrant the existence of the seam or vein. Also, where a lessee covenants to pay yearly and every year a dead or certain rent of 500*l.*, and it is provided that he may (in respect thereof) win and get 13,000 tons of coal per annum, and that if he get more than 13,000 tons, he shall pay a further or uncertain rent or royalty in respect of the excess,—there is no condition implied, that there is coal to work, or coal of sufficient quantity to make up the 13,000 tons per annum (*a*); or (and still less) that the coal is workable to a profit (*b*).

Contract for the sale of non-existing mines,—enforced, when it is really an agreement giving a right to search for mines.

Covenant to pay dead rent,—enforced, although no coal to be gotten.

Where in a lease there is a covenant to work out all the coal, and the rent (or royalty) is calculated on the footing of the whole being gotten and worked,—if the coal is found to be unworkable to a profit, the lessee (on paying up the whole aggregate sum for the royalty) will be excused working (*c*),—*scil.*, because if the lessor gets all the royalty bargained for, it is inequitable of him to compel the lessee to continue working at

When royalty only is payable, calculated on the whole coal,—payment up of the whole royalty, exempts from the duty of further

(*x*) *Bishop* v. *Goodwin* (1845), 13 Mee. & W. 260.
(*y*) *Clayton* v. *Penson*, W. N., 1878, 158.
(*z*) *Jefferys* v. *Fairs* (1876), 4 Ch. D. 448.
(*a*) *Bute* (*Marquis*) v. *Thompson* (1844), 13 Mee. & W. 487.
(*b*) *Ridgway* v. *Sneyd* (1854), Kay, 627.
(*c*) *Smith* v. *Morris* (1788), 2 Bro. C. C. 311.

working the coal, when unworkable to a profit. Dead rent,—continues payable in such a case.

a continuing heavy loss. But it is otherwise, if the lease reserve a dead rent, whether the colliery is worked or not, and reserves also a royalty beyond (*d*),—for, in such latter case, the dead rent continues payable, and the lessee is not entitled to be excused payment of it, upon paying merely for the whole coal demised at the royalty rate (*e*); still less can he recover back any dead rent paid in excess of the whole workable coal (*f*).

Where the rent reserved is of portion of the coal worked,—an accident which can only be remedied at an outrageous or disproportionate cost, is no excuse.

In *Morris* v. *Smith* (*g*), where the rent in a coal lease was reserved with reference to the coal which should be worked; and there was a covenant or undertaking on the part of the lessee to work the coal so far as working should not be prevented by any unavoidable accident; and it appeared, that there had been a vast influx (or inroad) of water, whereby the workings were stopped; but although the water might have been got rid of by artificial means and the workings might then have been resumed, yet the lessee refused to use the means required to get rid of the water,—alleging that the expense of so doing was out of all proportion to the profits he could make from the coal to be thereafter gotten,—the court said, that he remained liable for the rent, whether the workings were profitable or not.

Way-leave rent, liability for,—occasionally a hardship, where circumstances have altered.

Where (in a lease of surface land and of the mines thereunder) a way-leave rent was reserved to the lessor in respect of all foreign coal, etc. (dug and gotten within twenty miles of the demised premises) brought "*through*, *over*, *or under*" the demised premises; and the lessee parted with the possession of the surface to a railway company (the railway company acquiring the land under the provisions of an Act of Parliament which obliged them to *indemnify* the lessee against all liability under the lease in respect of the surface land so acquired); and the railway company constructed sidings on the land, and therein shunted trucks (loaded with foreign coal, etc., dug as well within as without the twenty miles limit), for short periods of time, in the course of their transit along the railway, no part of the railway (save the sidings) being upon the surface lands so acquired,—the court held, that the way-leave rent was payable,—the words *through*, *over*, *or under* not being capable of being read as meaning *through* (whether *over* or *under*, *i.e.*, whether above ground or under ground); and the literal

(*d*) *Phillips* v. *Jones* (1839), 9 Sim. 519.
(*e*) *Ridgway* v. *Sneyd* (1854), Kay, 627.
(*f*) *Mellers* v. *Devonshire* (*Duke*) (1852), 16 Beav. 252.
(*g*) (1783), 3 Doug. 279.

meaning was not capable of being varied by anything in the lease itself; but the claim against the railway company was considered an unreasonable one, and one which neither the lessor nor the lessee had contemplated at the time of the lease (*h*).

RENTS, REMEDIES FOR THE RECOVERY OF.

Rents,—recoverable by (1) Distress; (2) Action of debt; (3) Action on covenant to pay.

Where a tenant is holding under a demise at a stipulated rent, the landlord has his remedy by distress or by action of debt; and in most cases, the demise contains also a covenant for the payment of the rent, and the tenant may be sued on that covenant if the rent is not paid (*i*). And if the lessee assigns to another, the landlord has against the assignee, *so long as he remains in possession*, the same rights which he had against the original tenant; but if, instead of assigning his interest, the lessee creates a tenancy under himself, then the original landlord may either distrain on the under tenant, or may bring his action for debt or on the covenant against the original lessee (*i*). And where no legal tenancy or sub-tenancy has been created, but the land has been occupied by a third person with the consent of the owner, then, in general, the owner may maintain an action against the occupier for the use and occupation of the land,—on an implied assumpsit by such occupier to pay reasonable compensation for his occupation; and where possession of land has been wrongfully had without the consent of the owner, there is a remedy by an action for trespass for the wrongful occupation. All which remedies are legal remedies, well adapted to enable the owner of land in all circumstances to obtain either the rent or (as the case may be) reasonable compensation for the use of his land (*i*).

Assignee of lessee,—liability of.

Underlessee,—liability of.

(4) Liability for use and occupation,—against a mere (lawful) occupier.

(5) Trespass against wrongful occupier.

But the circumstance that there is a relation of an equitable character subsisting between the lessee and the actual occupier, that circumstance cannot give any equitable right to the landlord,—for he claims by title paramount both to the trustee and to the *cestui que trust*; and whatever the relation between the lessee and the person or company that is in the actual use and occupation of the land may be, that is nothing to the landlord,—*scil.*, because he (the landlord) has his legal remedy by distress, or he may bring his action against the lessee; but if the *cestui que trust* should (as he certainly may) call on the

Trustee and *cestuis que trustent*,—relation of, to lessor.

(*h*) *Rous* v. *Great Western Rail. Co.* (1870), L. R. 4 H. L. 650.

(*i*) *Walters* v. *Northern Coal Mining Co.* (1855), 25 L. J. (N.S.) Ch. 633, *per* Lord CRANWORTH, L.C., at pp. 637, 638.

lessee to assign the legal interest to him, the landlord would then have a legal remedy by action against the *cestui que trust* as assignee (*j*).

When lease not executed by the lessee, but possession is taken under the lease,—effect.

Also, it can make no difference in principle that the lease is not executed by the person to whom the demise is made,—except that (in such a case) the landlord may not be able to maintain an action of covenant; but if the person to whom the demise is made accepts the lease, either by occupying the demised property himself or by permitting others (as his nominees or as his *cestuis que trustent*) to do so, the non-execution of the instrument of demise will not prevent the lessor from recovering the rent by distress or by action of debt against the lessee (*j*). Of course, where the demise is made to a person who neither executes the lease nor adopts it by entry or otherwise, he (the lessee) is a mere stranger against whom the landlord can have no rights; and if (in such last-mentioned case) other persons enter claiming to be the nominees or the *cestuis que trustent* of such non-executing and non-adopting lessee, the landlord's remedy must be by distress or (*semble*, by action of trespass), and is not either in debt or on covenant (*j*).

The *cestuis que trustent* may become the lessees or legal assignees, and liable as such.

But if there should be an express contract between the *cestuis que trustent* and the landlord, that he (the landlord) should grant, and that they (the *cestuis que trustent*) or their trustees should accept, the lease, the landlord would in that case be entitled to a specific performance of the contract, and the *cestuis que trustent* would be compelled to fulfil their contract, and (either by themselves or by their trustees), to execute a counterpart of the lease, the landlord having first executed the lease,—and after such lease and counterpart had been executed, the legal relations above enumerated would apply as between the landlord and his lessee (and the assignee of the lessee),—but otherwise the *cestuis que trustent* would remain exempt as before, the lessee only (or his assignee) being and remaining liable to the landlord (*j*).

Trustee-lessee, and not his *cestuis que trustent*, —are liable to lessor, the rent being a

In *Walters* v. *Northern Coal Mining Co.* (*k*), where certain (coal) mines had been leased to a trustee for the defendant company at a fixed or certain rent, and at a tonnage (or ten tale) rent beyond; and the term was for forty years, determinable by the lessee at the end of every third year by giving

(*j*) *Walters* v. *Northern Coal Mining Co.* (1855), 25 L. J. (N.S.) Ch. 633, *per* Lord CRANWORTH, L.C., at pp. 637, 638.

(*k*) (1855), 25 L. J. (N.S.) Ch. 633.

one year's previous notice; and the defendant company entered into possession and worked the mines under the lease for a little over a year, and then abandoned the mines as unprofitable,—never having paid any rent, or given any notice to determine the term; and about nine years afterwards the company went into liquidation, and the liquidator gave the notice to determine the term, protesting also that the lease was not a good lease; and the plaintiff (the lessor) thereupon commenced this action to recover from the company the alleged arrears of rent, alleging that it was a debt in equity of the company,—the court said, that the lessor should have sued the trustee-lessee, and not the company (the *cestui que trust*), the relation being a purely legal relation.

legal debt, and not an equitable demand.

EQUITABLE ASSIGNEE, IN POSSESSION.

In *Cox* v. *Bishop* (*l*), where there was a lease of mines reserving rents, and subject to covenants and conditions, and the lessee covenanted also not to assign without the consent of his lessor; and the lessee afterwards agreed in writing to assign his interest to the defendants; and they worked the mines under this agreement, but no deed of assignment was ever executed to them; and the defendants afterwards assigned over all their interest to an indigent workman,—the court said, that, although there was a good equitable assignment under the agreement, and although the equitable assignees were in possession, still they were not liable at the suit of the lessor for the performance of the covenants, TURNER, L.J., observing, that the agreement was not between the lessor and the defendants, and a court of equity did not treat the agreement as a tenancy.

An equitable assignee, although in possession,—is not a legal assignee, or liable to the lessor on the covenants of the lease.

In *Clavering* v. *Westley* (*m*), where the owner of a coal mine leased it to a trustee for five other persons, and they entered and worked the mines; and, the trustee becoming insolvent, the lessor insisted that the *cestuis que trustent* were liable to him for the mine-rents, and sued them accordingly, joining the trustee as a co-defendant,—Lord TALBOT decreed, that an account should be taken of the amount due to the lessor, and he directed that that amount should be paid to the lessor by the lessee; and further, that in case the lessee made default, then that an account should be taken of the moneys of the *cestuis que trustent* in the hands of the trustee, and the amount due was to be paid thereout; and in case such moneys should be found

Liability of *cestuis que trustent*, when (and while) in possession under a lease to their trustee.

(*l*) (1857), 8 De G. M. & G. 815. (*m*) (1735), 3 P. Wms. 402.

insufficient to pay the amount due to the plaintiff, then the *cestuis que trustent* were to pay to the plaintiff,—each of them one-fifth part of,—the deficiency ; and the decree extended also to the future accruing payments,—*scil.*, while and so long as the *cestuis que trustent* should continue in the possession.

FUTURE RENTS, WHERE COMPANY IN LIQUIDATION.

Where a limited company is the lessee of mines,—rights of the lessor, in the liquidation, in respect of future rent.

Where mines have been demised to a limited company reserving certain and uncertain rents, and the company goes into liquidation, the lessor is not a secured creditor in respect of his rents,—and so cannot ignore the liquidation, but must proceed under it (*n*) ; and he is entitled to enter a claim in the winding-up for the whole of the future rents (*o*), But where the lease is sold and assigned in the winding-up, the assignee may, of course, fully pay all the future rents ; and, therefore, the court will provide that the lessor shall not receive, upon his claim in the winding-up, more than the company is let in for through the default of the assignee (*p*). And, firstly, as against the *creditors* of the company, the lessor will receive nothing on account of his claim, nor will any portion of the assets of the company be impounded by way of security for his claim, on the distribution of a dividend, *so long as there is no rent actually accrued due and in arrear at the date of the distribution* (*q*). But, secondly, as against the *shareholders* of the company, where there are surplus assets after all the debts are paid, and the company is about to divide these assets among the shareholders, the court will require the company to provide for the lessor's claim in respect of his future rents (*r*),—the exact provision to be made depending on all the circumstances of the case (*s*).

(1) As against the company's creditors.

(2) As against the shareholders.

Where the company is assignee of the lessee.

And where the company is not the original lessee, but is an assignee merely of the original lessee, and in the assignment the company has given the usual indemnity against the future rents and against the lessee's covenants and conditions, the original lessee will be entitled to have practically the same provision made for his indemnity as the lessor (*t*).

(*n*) *In re Westbourne Grove Co.* 1877), 5 Ch. D. 248 ; 25 W. R. 509.

(*o*) *Re Horsey's Claim* (1868), L. R. 5 Eq. 561.

(*p*) *Re Hayter Granite Co.* (1866) L. R. 1 Ch. App. 77.

(*q*) *Re Horsey's Claim, supra.*

(*r*) *Elphinstone* v. *Monkland Iron Co.* (1886), 11 App. Cas. 332.

(*s*) *Oppenheimer* v. *British, etc. Bank* (1877), 6 Ch. D. 744.

(*t*) *Re Midland Coal and Iron Co., Craig's Case,* [1895] 1 Ch. 267.

Also, where the company's capital is being reduced, the like provision is required to be made as well in favour of the lessor, as also, *semble*, in favour of the lessee where the company is the indemnifying assignee (*u*).

On reduction of the company's capital.

OTHER LIABILITIES OF COMPANY IN LIQUIDATION.

As regards the lessee's covenants, other than the covenant for the payment of rent.

Where the company is the original lessee of mines, and is in liquidation,—the lessor may (and should) enter a claim in the liquidation in respect of the future and contingent liability of the lessee on the lessee's covenants and conditions contained in the lease,—or else obtain a declaration to the effect that the liability on such covenants and conditions is incapable of being fairly estimated ; and the same course is open to the original lessee, where the company is the assignee, and has given the lessee the usual indemnity (*x*).

DISTRESS,—ON ADJOINING COLLIERY.

Distress for rent,—on adjacent colliery as well as on demised colliery.

Where mines are leased by A. to B., with right to work the same by instroke from other adjoining collieries which are the property of B. at the date of the lease, B. may lawfully grant to A., in respect of the rents and royalties reserved by the lease, a right of distress over such adjoining colleries,—*scil.*, as against B. himself and persons claiming through or under him the demised and the adjoining collieries (*y*) ; and where the respective adjoining mines which are so worked together are demised by different lessors and by separate leases, this extended power of distress may, of course, be reserved in favour of each lessor in and by the lease granted by him (*z*) ; and as regards distraining on the demised premises themselves for the rent (or for the royalty) (*a*) reserved by the lease thereof, that right exists without any express clause giving it.

In *Lee* v. *Roundwood Colliery Co.* (*b*), where the company were the lessees (under different lessors) of two adjoining collieries, and there being no shaft on the one, both the collieries were worked by the shaft on the other ; and in each lease, the right of distress for rent in arrear was expressed to be not only on the

(*u*) *Telegraph Construction Co.* (1870), L. R. 10 Eq. 384 ; *Craig's Case*, *supra*.

(*x*) *Hardy* v. *Fothergill* (1888), 13 App. Cas. 351 ; *Craig's Case*, *supra*.

(*y*) *Daniel* v. *Stepney* (1874), L. R. 9 Ex. 185.

(*z*) *Lee* v. *Roundwood Colliery Co.*, [1897] 1 Ch. 373.

(*a*) *Daniel* v. *Gracie* (1844), 6 Q. B. 145.

(*b*) [1897] 1 Ch. 373.

chattels of the lessees on the demised colliery premises but also on the chattels of the lessees on any adjoining colliery premises,—the court held, that the right of distress was validly created, and that either of the lessors might therefore lawfully distrain on the colliery premises adjoining those demised by him ; and further that such extension of the right of distress did not constitute the lease (*quoad* the power of distress) a bill of sale within the Bills of Sale Acts, 1878, 1882 (*c*).

A royalty (or uncertain rent) may, of course, be distrained for, when in arrear, equally as the dead or certain rent may be distrained for (*d*).

ROYALTIES, CONSTRUCTION OF SPECIFIC COVENANTS TO PAY.

Royalties,—calculation of, under special covenants to pay, or to render.

Where in a mining lease, the lessee covenanted to pay (in addition to the dead or certain yearly rent) a royalty or uncertain rent for every score of baskets of coal worked, and one-half of all such sums as the coal *should sell for at the pit's mouth* above fourpence the basket,—the covenant was held not to extend to coal *sold elsewhere than at the pit's mouth* (*e*) ; but the covenant was badly expressed,—the word "*should*" being a mistake for "would," and the intention having been to take the price *as upon a sale at the pit's mouth* in order to ascertain the one half of the excess of that price over the fourpence the basket, and which one half was to be the further royalty payable.

(1) Prices, "on sale at pit's mouth."

Rent being one third part of "the money arising from sales of the coal."

In *Edwards* v. *Rees* (*f*), where upon the lease of a colliery there was reserved to the lessor (the plaintiff) a rent described as "one third part of the money which should *arise, or be made, received or produced*, from the sale of the coals" ; and the lessee covenanted to keep true accounts of "*all coal daily raised*," and to deliver to the plaintiff copies of such accounts,—the court said, that the rent was to be one third of all coals sold, whether or not the prices for which they had been sold were paid or not ; or, in other words, that the proof of the sales (without any proof of the purchase prices having been paid) sufficed.

(2) Quarterly calculations.

And where the covenant in a mining lease was that the lessees should deliver quarterly to the lessor two-thirteenths of all coal to be raised, or else should pay him the value thereof in money ; and it was provided, that if at the end of the first

(*c*) 41 & 42 Vict. c. 31 ; 45 & 46 Vict. c. 43.

(*d*) *Daniel* v. *Gracie* (1844), 6 Q. B. 145.

(*e*) *Gerrard* v. *Clifton* (1798), 7 T. R. 676.

(*f*) (1836), 7 Car. & P. 340.

quarter of any year such deliveries or payments should not have equalled in value or amount the sum of 37*l.* 10*s.*, the lessees should also then pay such additional rent or sum as would make up that sum ; and further, that if at the end of the second quarter such deliveries or payments for that and the preceding quarter should not have equalled the sum of 75*l.*, the lessees should then pay the deficiency,—similar provisions being made for the third and fourth quarters ; and there was a declaration that the royalties should always amount to the yearly sum of 150*l. at the least*,—It was held, that in calculating the amount due at the end of the year, the excess of the royalty above 37*l.* 10*s.* in one quarter could not be set off against the deficiency of any previous quarter, but that the certain rent was to be completed every quarter (*g*).

(3) Mineral, gotten by a trespasser.

In *Attersoll* v. *Stevens* (*h*), where there was a lease for years of certain lands containing brick-earth, with liberty for the lessee to dig half an acre of the brick-earth every year ; and the lessee covenanted not to dig more, or (if he did) that he would pay a double rent ; and it appeared that some portion of the brick-earth was dug by a stranger, and that the lessee recovered against him (the wrongdoer) the value of the brick-earth so dug,—it was held, that the lessee was entitled, as against his lessor, to retain the whole amount for his own benefit, — *scil.*, because the brick-earth which had been so wrongfully dug was not brick-earth dug under the license, or within the covenant for payment of the double rent.

(4) Lessor's option to take the mineral or its value.

Where the reservation was of one-fourth the coal raised, or (at the option of the lessor) the value in money of such one-fourth,—to be rendered, or (as the case might be) paid, monthly ; and if (for any year) the value of that one-fourth fell short of 400*l.* by the year, then there was the further reservation of so much additional rent as would (for each year) make up 400*l.*,—and the lessor elected to receive his *whole* rent in money ; and at the end of the first two years and three calendar months of the lease, he sued for 900*l.* (being two and a quarter times the 400*l.*), the court said he was entitled to the 900*l.*,—although (if he had not elected to receive his whole rent in money) the quarter year would not have been recoverable until the third year of the lease was expired, when the whole rent for such

(*g*) *Bishop* v. *Goodwin* (1845), 14 M. & W. 260 ; 14 L. J. (N.S.) Exch. 290 ; *Buckley* v. *Kenyon* (1808), 10 East, 139.

(*h*) (1808) 1 Taunt. 183.

third year (so far as not already paid by the monthly renders) would be recoverable (*i*).

(5) Duty of lessee to work, where no such option.

Where there was a demise of limestone,—and of limekilns,—and the lessee covenanted that he would, at all times and seasons of burning lime, supply the lessor and his tenants with lime at a certain price, for the improvement of their lands, and for the repair of their houses,—it was held, that this amounted to a covenant to burn lime at such seasons, and that the lessee could not plead that no lime was burnt on the premises, out of which the lessor could be supplied (*k*).

Where only uncertain rent reserved, —duty of lessee to commence working forthwith.

Where there is an agreement for the lease (for twenty-one years) of a coal mine, and no dead rent is fixed, but only a royalty on the amount gotten is made payable,—there is, in general, a duty to commence working forthwith, and also to work continuously (*l*).

Dead (or certain) rent, —when liability to continue payment of, (1) Ceases; or

In *Smith* v. *Morris* (*m*), where there was a minimum rent payable yearly and also a tonnage rent beyond, but (upon the whole effect of the lease) the lessor was to receive only the value of the whole workable coal,—so that the liability to pay the minimum rent would cease so soon as the aggregate amount of the payments on account of the minimum and the tonnage rents equalled that value,—which the lessee alleged to be the case,—the court declared that the lessee would not be liable for the minimum rent, in case that allegation were true; and an enquiry was directed to ascertain it, the lessee offering to pay the deficiency if there should be found to be any portion of the value still unpaid for.

(2) Continues.

In *Phillips* v. *Jones* (*n*), where there was a minimum rent and also a royalty rent beyond,—and the lessee had power to determine the lease (and so escape the liability to pay the future minimum rent) so soon as the coal should have been exhausted; but the lessee could not allege that the coal had been exhausted, although (owing to unforeseen faults and accidents in the mine) what coal was left could only be worked at a ruinous expense,—and accordingly the lessee was not in a position to determine (and had not determined) the lease,—he was held liable to continue paying the minimum rent; and he was not entitled to escape, on paying up the value of the coal which was left.

(*i*) *Buckley* v. *Kenyon* (1808), 10 East, 139.
(*k*) *Shrewsbury* (*Earl*) v. *Gould* (1819), 2 B. & Ald. 487.
(*l*) *Sharp* v. *Wright* (1859), 28 Beav. 150.
(*m*) (1788), 2 Bro. C. C. 311.
(*n*) (1839), 9 Sim. 519.

In *Ridgway* v. *Sneyd* (*o*), there was a demise of coal mines at a minimum rent and also at a royalty beyond,—the lessee being the owner (or lessee) of the mines adjoining; and the covenant was to work in the same progressive and regular course as the adjoining minerals were worked, and to clear out the demised coal, subject to this, namely, that the lessee was not to be required to work any coal which could not be worked to a profit,—and the court held, that the minimum rent continued payable, although the demised mines could no longer be worked to a profit, WOOD, V.-C., distinguishing *Smith* v. *Morris*, *supra*, and considering that the case fell exactly within the principle of *Phillips* v. *Jones*, *supra*, and adding:—"In this case, both lessor and lessee, at the date of the demise, believed the coal to be workable to a profit, but it turns out not to be so. . . . Every one who has anything to do with mining knows that all mines are liable to faults. . . . And this is a case of *caveat emptor*, equally as if the lease had been a sale." And the like principle has been applied in many subsequent cases, and appears to be now well established (*p*), no minor differences altering the rule where the covenant is absolute, to pay the dead or certain rent, whether the mine is worked or not, or there is workable coal or not (*q*).

Where the rent is really an instalment of the purchase money.

Where, however, the purported lease is, in reality, a sale of the coal, and the purported rent is merely an instalment of the purchase money, the rent will, of course, cease to be payable, whenever the lessee can show (the burden being on him to show) that he has ascertained the quantity of coal, and has fully paid the price (*r*); for, in such a case, the principle of *Smith* v. *Morris*, *supra*, would be applicable.

DEAD RENTS,—CESSER OF, ON DETERMINATION OF LEASE.

Dead rent,—what necessary to escape future payment of.

Where a lease is determinable on giving a prescribed notice of the intention to determine it, the notice to determine must, of course, be given,—in order to escape the payment of the dead rent; and it is not sufficient to shew merely, that all the coal (or all the fairly workable coal) has been gotten (*s*),—unless

(*o*) (1854), Kay, 627.

(*p*) *Marquis of Bute* v. *Thompson* (1844), 13 Mee. & W. 487; 14 L. J. (N.S.) Exch. 95; *Jefferys* v. *Fairs* (1876), L. R. 4 Ch. D. 448.

(*q*) *Mellers* v. *Duke of Devonshire* (1852), 16 Beav. 252; 22 L. J. (N.S.) Ch. 310.

(*r*) *Jowett* v. *Spencer* (1847), 1 Exch. 647; 15 L. J. (N.S.) Exch. 347; 17 L. J. (N.S.) Exch. 367.

(*s*) *Cartwright* v. *Forman* (1866), 7 B. & S. 243.

where that also is expressly made a ground for determining the lease (*t*).

DETERMINATION OF LEASE, BY NOTICE.

Notice to determine lease,—form of, and operation of.

The clause prescribing the notice required for the determination of the lease usually expresses that the notice (whether six months or longer) is to be such as will expire on or before a specified date (and which date is usually at the full end of some one year of the term) ; and, of course, a notice which did not so expire, would be ineffectual, — so that (if good at all) it would be good only for the next following year or for other the next following determinable period ; and a fresh notice had better in such a case be given (where that is possible). But where the lease or agreement is informal, or where it is for a holding from year to year, less accuracy is, in the general case, observed ; and in the case of a lease of mines from year to year, where the notice required to determine the lease was a six months' notice, and it was expressed that the lessee might give it at any time, the court said, it might be given at any time,—and the term would end on its expiration, whether that was the end of a current year or not (*u*) ; but that decision was exceptional, the general rule being that the notice, whether a half year or a quarter year or a full year, shall expire with the year (*x*).

Determination of lease, and subsequent continuance in possession for short period under a custom,—not a holding over.

In *Jones* v. *Shears* (*y*), there was an agreement for a lease of coal for twenty-one years, determinable by the lessee, either (1) by giving six months' notice if the whole coal were worked out ; or (2) by giving two years' notice at any time ; or (3) by paying two years' rent in advance ; and the lessee (defendant) gave the two years' notice to determine,—but after the two years were expired, he stayed on for two months longer, in order to get out the pillars of coal, alleging a custom entitling him to do so ; and the plaintiff, alleging that such continuance in possession was a holding over (whereby the notice was waived, or whereby at all events the tenant became a tenant from year to year), sued the defendant for the rent accruing subsequently to the expiration of the two years,—the court said, it was for the jury to find (and the jury found) that the defen-

(*t*) *Jones* v. *Shears* (1830), 7 C. & P. 346 ; *Griffiths* v. *Rigby* (1856), 1 H. & N. 237.

(*u*) *Bridges* v. *Potts* (1864), 17 C. B. (N.S.) 314 ; 33 L. J. C. P. 338.

(*x*) *Doe* v. *Donovan* (1809), 1 Taunt. 555 ; *Bridges* v. *Potts*, *supra*.

(*y*) (1836), 4 A. & E. 832.

dant had stayed on under the pretext of the custom (whether a good custom or not), and without any intention of holding over; and consequently no rent was payable.

Notice determining lease,—when its efficacy is dependent on the due prior performance of *all* the lessee's covenants.

In *Friar* v. *Grey* (*z*), there was a proviso enabling the lessee only (and not the lessor) to determine the lease at the end of the first eight years of the term, on giving eighteen months prior notice in writing ; and it was expressed that, in the event of such notice being given, the lease should end, "all arrears of rent being paid, and all the lessee's covenants *having been* observed and performed" ; and the determination of the lease was expressed to be without prejudice to any then accrued claim by either lessor or lessee against the other ; and it appeared, that the lessee had given the due notice, and that the lessor sued him for rent accruing after the expiration of the eight years, alleging that the lease had not been determined, because the lessee's covenant to pump out the mine-water had not been observed up to the date of the purported determination, —and the court held, that such breach of covenant was fatal to the notice,—*scil.*, because the prior performance of *all* the covenants was a condition precedent to the validity of the notice according to the general rule in such cases applicable (*a*) ; and that the words "*without prejudice, etc.*" were only inserted in the lease *pro majori cautelâ*, and had not the effect of rendering the condition precedent not a condition precedent.

(*b.*) COVENANTS TO WORK.

Covenant to work mine efficiently,—true effect of.

In *Lord Abinger* v. *Ashton* (*b*), in a demise of three coal seams the lessee covenanted to work the demised mines carefully and effectually, to the best advantage and according to the customary mode of working in the district,—and the court said that such a covenant did not import the duty of *continuously* working ; nor the duty of working all the mines together, if you worked any ; but imported only that when you did work any one or more of the mines, you should work efficiently and according to the custom of the district.

Covenant to work,—where duty to continue working.

In *Kinsman* v. *Jackson* (*c*), where the covenant in a lease of china-clay was during the term to work the china-clay and china-stone in the most proper and effective manner, and with

(*z*) (1850), 5 Exch. 584.
(*a*) *Porter* v. *Shepherd* (1796), 6 T. R. 665.
(*b*) (1873), L. R. 17 Eq. 358.
(*c*) (1880), 42 L. T. (N.S.) 80, 568.

a reasonable number of able-bodied men and assistants kept employed on the said works at all reasonable and usual working times, and so that the china-clay and china-stone to be found might be raised, washed, and made merchantable as speedily as practicable ; and there was a proviso for re-entry upon breach of any of the covenants of the lease or for non-payment of the dead rent and royalties respectively thereby reserved,—and the lessees had abandoned getting the china-clay, although they were making merchantable what had been already raised,—the court held, that in omitting to "*raise*" the china-clay, the lessees had been guilty of a breach of the covenant, even if they had in other respects conformed with the provisions of the covenant ; and the court refused, upon an interlocutory application, to restrain the lessors, who had re-entered and taken possession of the land and works, from continuing in such possession until the trial of the action.

Covenant to work,—in "a proper and workmanlike manner,"—working by *instroke* may be proper ;

Where the agreement for a lease of coal mines provided for a certain rent being reserved, and provided also that there should be inserted in the lease a covenant on the lessee's part "*to work the coal in a proper and workmanlike manner*,"—and the dead rent was not to be payable (but only a royalty on the amount of coal gotten) during the first three years of the lease,—if the necessary steps were taken *bonâ fide* and with ordinary dispatch "*to win and work the coal*" ; and the lessee (who was the owner also of the adjoining coal seams) proceeded to work (and did work) the demised seams by instroke,—and the lessor contended that he should have sunk a pit, and he sued the lessee for specific performance of the agreement, the court said he was entitled to specific performance, but the lease would not have inserted in it a covenant to sink a pit, or any covenant against working by instroke,—the evidence adduced at the trial having satisfied the court that working by instroke was (under the circumstances) a proper and workman-like mode of working the coal, and of winning it (*d*).

And there is no duty (although there may be a power) to sink a pit, in such a case.

In *Jegon* v. *Vivian* (*e*), the covenant was to work the demised mines in a proper and workman-like manner, *leaving them* (*at the end of the term*) *in such a condition as that the workings might be continued* ; and there was power to sink pits, but no express covenant to do so ; and the lessee worked by instroke, and did not sink a pit,—and the lessor sued the lessee for breach of the

(*d*) *Lewis* v. *Fothergill* (1869), L. R. 5 Ch. App. 103.

(*e*) (1871), L. R. 6 Ch. App. 742.

covenant, the court said, that the power to sink a pit did not imply a covenant on the lessee's part to do so; and that working by instroke was a proper and workman-like manner of working; also, that a covenant to work in a proper and workmanlike manner did not imply a covenant *to work continuously*.

Working regardless of the future,—not a proper mode of working.

A proper and workmanlike manner of working does not mean the best possible mode of working for the lessor; but it would be an improper and unworkmanlike mode of working, if a lessee simply dug and worked as much as he could get, regardless of the future (*f*).

DAMAGES FOR BREACH OF THE COVENANT TO WORK.

Damages for breach of covenant to work,—and of covenant to leave in repair,—where mere nominal, or none at all.

In *Foley* v. *Addenbrooke* (*g*), the plaintiff was the lessor and the defendant the lessee of certain lands, ironworks, and ironstone; and the action was for the breach by the lessee of certain covenants contained in the lease, and principally of two covenants,—by one of which the defendant covenanted to work continuously and effectually during the (forty-two years) term; and by the other of them he covenanted to repair and leave in repair at the end of the term; but, as regards the ironstone, the covenant to work contained the (usual) alternative to pay the dead or certain rent; and the lease gave the lessor the option of purchasing the lessee's trade-fixtures at the end of the term, and otherwise the lessee might remove them; and it appeared, that the lessee had otherwise fully performed his covenants, save that six months before the expiration of his term he had ceased working and had begun removing his fixtures, the lessor not having chosen to purchase them,—and under these circumstances, the court said that only nominal damages were recoverable for breach of the covenant to work; and as regards the covenant to leave in repair, it was not any want of repair to leave the brickwork dismantled of the fixtures, if as little damage as possible was done, and the brickwork was left in such a state as would suit any incoming tenant to replace his own fixtures in it,—in other words, if it was left in the most convenient condition for the restoration of similar works by the incoming tenant (if any).

Purchase-money for coal,—

Where a man sells and absolutely conveys the coal under his estate (or under any specified lands parcel of his estate), it is, in

(*f*) (1869), L. R. 5 Ch. App., *per* Lord HATHERLY, L.C., at p. 108.

(*g*) (1844), 13 Mee. & W. 174.

general, immaterial to him, so long as he receives the purchase money, whether the purchaser shall ever work and get the coal or not; and no covenant to work would therefore be inserted in such a purchase deed (*h*). But if the purchase price is to be ascertained by reference to the acreage of the coal *found* under the estate (or under the specified lands), it will be necessary to ascertain that acreage in order to fix the price; but where, in such a case, the purchaser covenanted to pay 40*l.* per annum on account of the price until the whole price was paid, the court said, it was for the purchaser to prove that the whole price was paid,—which he could do (and the vendor having parted with the possession could not do, or not so conveniently do) (*i*),—the word *found* only meaning "*ascertained to be*,"—*scil.*, because if *found* was to mean "*gotten*" or "*won and gotten*," the price might never be ascertained at all; and the payment to the vendor could not be suspended in that indefinite way.

(1) Where payable whether coal worked or not.

(2) Where payable for coal "*found*," —*i.e.*, ascertained to exist; and not necessarily "*worked and gotten.*"

SPECIFIC PERFORMANCE OF COVENANT TO WORK.

Express covenant to work one seam, in advance of (or concurrently with) another,—enforcement of.

The court will not decree the specific performance of a covenant to build or to repair,—neither directly nor (indirectly) by means of an injunction; consequently, no injunction will issue to prevent a mine being left unworked or being permitted to become dilapidated (*k*). But where in the covenant to build there is a provision to observe the line of elevation of the adjoining houses (or any other positive line of elevation), the court will (by injunction) specifically enforce the observance of the prescribed line of elevation (*l*),—therefore, *semble*, a covenant to work the upper and lower of demised seams of coal concurrently, and so as not to work the one in advance of the other, might be enforced.

Also, in *Lane* v. *Newdigate* (*m*), permitting the banks of a canal to remain below their original and proper level, or otherwise (in certain specific particulars) interfering with the regular original flow of the water in the canal,—contrary to a covenant whereby the defendant granted to the plaintiff a certain right to use the waters of the canal,—was restrained by injunction.

Express covenant to build some

Also, in *Scorer* v. *Great Western Rail. Co.* (*n*), where the defendant company covenanted (on acquiring the plaintiff's

(*h*) *Jewett* v. *Spencer* (1847), 15 Mee. & W. 662; 1 Exch. 647.
(*i*) *Ibid.*
(*k*) *Lord Abinger* v. *Ashton* (1873), 17 L. R. Eq. 358.
(*l*) *Franklyn* v. *Tuton* (1821), 5 Madd. 469.
(*m*) (1804), 10 Ves. 192.
(*n*) (1842), 2 You. & C. Ch. 48.

land) to construct an archway therein and to form and complete the approaches thereto, the court decreed the specific performance of the covenant,—as being for the construction of a definite work, essential to the plaintiff's enjoyment of his property, and which he himself could not construct without a trespass and great public inconvenience. And in *Wilson* v. *Furness Rail. Co.* (*o*), where the defendant company covenanted (on acquiring lands for their railway) to construct a road on land for that purpose conveyed to them by the plaintiff, and also to construct a wharf, the court decreed the construction of the road and wharf,—the refusal of the company to fulfil their covenant being dishonest; and the court made a like order (for a road, and wharf, with an approach road thereto and with level crossings) in *Fortescue* v. *Lostwithiel Rail. Co.* (*p*). Also, in the *Nuneaton Local Board* v. *Sewage Co.* (*q*), where the defendants, by continuing to pump at their sewage outfall works, could prevent the sewage from stagnating in (and being cooped back in) the plaintiff's sewers (which were in lease to the defendant company), an injunction was granted against their "*damming back*" the sewage.

specific work, —enforced, if a fraud in lessee to refuse to do it, without restoring the possession.

CONTINUOUS ACTS,—WHETHER ENFORCEABLE.

In *Blacket* v. *Bates* (*r*), where the plaintiff was the owner of a colliery, and was the licensee (at a way-leave rent) of a line of railway communicating with a river, and the defendant was one of the licensors; and there was an agreement (in the form of an award) between the plaintiff and the defendant directing (in effect) that the defendant should execute to the plaintiff a lease of the railway (so far as it lay on defendant's lands), and that the defendant should have the right of using the whole line on certain specified terms, and that the plaintiff should keep the line in repair, and also give the defendant the benefit of the engine-power,—the court said, that the provisions for the repair of the line and for the supply of engine-power were *continuous*, —and, as such, not specifically enforceable; and that it was wrong therefore to make a declaration of the rights of the parties, with liberty to apply to enforce them. But, *semble*, it would now be proper enough to make such a declaration,—at least, if the liberty to apply was to enforce the rights declared, or else (according as should be proper) to give damages

Continuous Acts,—declaration of right, with liberty to apply, from time to time.

(*o*) (1869), L. R. 9 Eq. 28.
(*p*) [1894] 3 Ch. 621.
(*q*) (1875), L. R. 20 Eq. 127.
(*r*) (1865), 2 H. & M. 270; L. R. 1 Ch. App. 117.

for their breach,—thereby avoiding a succession of actions on every denial of the defendant's rights or on every breach of the provisions in his favour. And if so, the decree for specific performance of the lease would have been granted,—although (in the particular case) it was refused, because the defendant was not entitled to specific performance of the provisions in his favour, and there was therefore a want of mutuality in the remedy.

Where the lease is only of mines *to be discovered or opened*,—and none are so discovered or opened,—effect of covenant to work.

Where the demise was of all mines of coal which (at the date of the demise) had been or which (during the demise) should be *discovered or opened* under the specified surface lands ; and the lessee covenanted to work the demised mines in a workmanlike manner,—the certain rent being small, and the lessor looking to the uncertain rent for his income from the mines ; the court said that the covenant was not broken, and could not be broken, as regards any mine never even discovered or opened,—*scil.*, because no others were demised (*s*) ; and as the defendant had never proceeded to work at all, he could not be held liable as for a breach of the covenant to work in a workmanlike manner.

(*c.*) COVENANT TO SINK PIT.

Covenant to sink a pit,—where no workable coal to sink to,—effect.

In *Hanson* v. *Boothman* (*t*), in the lease (which was of certain surface lands in Lancashire and of the seams or veins of coal thereunder) the lessees had covenanted to forthwith proceed to sink for the coal, and for that purpose to erect immediately the necessary fire-engines, etc., and (in default of their so doing) to pay the lessor a sum to be ascertained by arbitration ; and the lessees having failed to sink, etc., within a reasonable time, the arbitrator directed them to pay a specified sum for their interim occupation of the surface, and granted them an extension of time for complying with their covenant ; and thereafter the lessees proceeded to sink, but soon desisted, alleging that there were no workable seams of coal within or under the surface lands demised, or at any rate no seams of coal which would have defrayed the expense of working, which fact they said that they had ascertained by sufficient experiments and trials ; and the lessor contended that it was no answer to the breach of covenant, for the lessees to say that there were no coals, or none worth the expense of getting ; but it was held by Lord ELLENBOROUGH, C.J., that *it was an answer to say that they had tried*,

(*s*) *Quarrington* v. *Arthur* (1842), 10 Mee. & W. 335.

(*t*) (1810), 13 East, 22.

for no person could be bound to do impossibilities. And in *Jones* v. *Shears* (*u*), upon a covenant to work a coal mine, as long as it was *fairly workable*, it was held, that the lessee was not compellable to work the mine at a dead loss,—and in the particular case, it was proved that the coals in the mine would not yield any profit by working them.

(*d.*) USUAL COVENANTS, AND USUAL PROVISIONS.

Usual covenants,—what are, and why so called.

As regards "*usual covenants*,"—it is a general principle of law, that in the grant of any real hereditament there is implied a grant of everything necessary to make the grant effectual (*x*), —and in the case of leases, this implied grant extends to include everything necessary to the full enjoyment of the demised premises (*y*). And it is upon this principle, that the court determines what are "*usual covenants*" (*z*); and in *Henderson* v. *Hay* (*a*), Lord THURLOW decided,—and in *Church* v. *Brown* (*b*), Lord ELDON also decided, — that usual covenants meant covenants "*incidental to the lease*,"—and it was implied in every agreement, whether for a sale or for a lease, and whether of freehold hereditaments or of leasehold hereditaments, that the grantee or lessee on his part and the grantor or lessor on his part should respectively enter into such covenants with each other as were strictly incidental to the premises granted or demised ; and therefore all covenants are usual, which have by common consent been found necessary to perfect the enjoyment of the subject matter of the agreement ; and it is by reason of such common consent, that the covenants are deemed usual.

Rent, when ascertainable by the amount of coal gotten,—right of lessor to enter and measure.

In *Blakesley* v. *Whieldon* (*c*), where there was an agreement for the lease of mines,—in the form of a sale of the minerals at a principal sum payable by instalments,—and the payment of the instalments was to be accelerated in case a greater quantity of the mines than that attributable to any one instalment should be gotten before the period fixed for the payment of such instalment,—but the agreement did not expressly say that the lessor (or vendor) was to have a right to enter and inspect the mines for the purpose of ascertaining the quantity of the mines

(*u*) (1836), 7 Car. & P. 346 ; *Binney* v. *The Ince Hall Coal and Cannel Co.* (1866), 35 L. J. Ch. 363 ; *Griffiths* v. *Rigby* (1856), 1 Hurl. & N. 237 ; 25 L. J. Exch. 284.

(*x*) *Pomfret* v. *Rycroft* (1669), 1 Saund. 321.

(*y*) *Senhouse* v. *Christian* (1781), 1 T. R. 560.

(*z*) *Blakesley* v. *Whieldon* (1841), 1 Ha. 176.

(*a*) (1792), 3 Bro. C. C. 632.

(*b*) (1808), 3 Anst. 700 ; 15 Ves. 264.

(*c*) (1841), 1 Ha. 176 ; 11 L. J. (N.S.) Ch. 166.

which should from time to time have been gotten,—the court said that such a provision was implied ; and in its order, that a lease (or conveyance) should be executed in specific performance of the agreement, the court directed the insertion of an express provision giving the lessor (vendor) the right of entry and inspection.

Determination of lease, if workings unprofitable, —right of, in lessee, not a usual right.

In *Strelley* v. *Pearson* (*d*), the plaintiff agreed to lease a colliery to the defendant for thirty-one years,—the colliery consisting of two seams of coal (in Derbyshire) ; and the defendant agreed to accept the lease ; and the agreement provided that all the usual mining covenants and conditions should be inserted in the lease ; and the defendant was given possession of the colliery ; but no lease was granted for six years afterwards,—when the defendant ceased working, and gave notice to the plaintiff of his intention to close the colliery. The plaintiff then commenced this action for specific performance of the agreement,—and the defendant contending that the lease to be granted in performance of the agreement should contain a clause enabling him to determine the lease, when he could no longer work to a profit,—the court held, that such a clause was unusual, and (not having been specifically agreed upon) could not be inserted in the lease ; but such a clause (which appears to be a usual clause in Scotch mining leases) (*e*) should be specifically stipulated for beforehand.

Re-entry, proviso for,—usually confined to breach of covenant to pay the rents.

In a mining lease, the proviso for re-entry is (or, at all events, used to be) confined to any breach of the covenant to pay the rent reserved (including, of course, the uncertain royalty as well as the certain rent) (*f*),—the reason being (or having been) that the lessee could also be relieved against the forfeiture for non-payment of rent. And although the covenants in leases generally may now (for the most part) be relieved against under s. 14 of the Conveyancing and Law of Property Act, 1881 (*g*), still the law is, that the proviso for re-entry is still to be limited to the breach of covenant for the payment of rent (*h*),—*scil.*, in the absence of any specific provision for giving it a more extended operation; but such specific provision is (in all cases of mining leases or agreements for leases) most desirable, as is, in fact, contemplated by the section of the Conveyancing Act before referred to.

(*d*) (1880), 15 Ch. D. 113.
(*e*) *Gowan* v. *Christie* (1873), L. R. 2 H. L. (Sc.) 273.
(*f*) *Hodgkinson* v. *Crowe* (1875), L. R. 10 Ch. App. 622.
(*g*) 44 & 45 Vict. c. 41.
(*h*) *In re Anderton and Milner's Contract* (1890), 45 Ch. D. 476.

The covenant *not to assign, etc.*, without leave is deemed not a usual covenant,—and therefore not to be inserted in leases, unless where the agreement for the lease expressly stipulates for it; and the reason commonly given for this rule is this, namely, that the agreement gives the estate in equity, and the equitable estate imports assignability, and that incident of the equitable estate is not to be cut away from the estate when (by means of the lease) it is converted into a legal estate (*i*).

Covenant not to assign,—not a usual covenant.

Where a lease is created by deed, and the word *demise* is not used, and there is no express covenant either for title or for quiet enjoyment,—there is an implied covenant for quiet enjoyment (notwithstanding the absence of the word *demise*); but there is no implied covenant for title (*k*); and inasmuch as the covenant for quiet enjoyment which would be implied from the use of the word *demise* would be a covenant in respect only of (and during the continuance only of) the lessor's estate or interest (*l*), therefore the implied covenant for quiet enjoyment which the law implies even in the absence of the word *demise*, cannot be held to have a longer (or more extensive) operation (*m*).

Covenant for title, by lessor,—not usual.

Usual covenant by lessor,—for quiet enjoyment.

(*e.*) UNUSUAL COVENANTS.

As regards a lessee's covenants *usual* and *unusual*, these distinctions appear to be established, that is to say:—Firstly, as between the immediately contracting parties themselves,—upon a contract for an underlease (*n*) or for the sale and assignment of a lease (*o*),—the underlessee or the purchaser, unless he has had an opportunity, before signing the contract, of inspecting (or of otherwise learning the contents of) the lease, is not to be deemed to have (where he has not in fact) any notice of the *unusual* provisions contained in the lease,—and may therefore, on discovering them (if there are any), refuse to complete the contract. But it is otherwise, if he has had such opportunity (*p*); and, of course, he has notice (or is deemed to have notice) of all the *usual* covenants and provisions of the lease, whether he had, in fact, inspected the lease or not (*q*).

Unusual covenants,—effect of, upon purchaser, before and after completion,—

(1) As between the vendor and the purchaser themselves.

(*i*) *Church* v. *Brown* (1808), 15 Ves. 258.
(*k*) *Baynes* v. *Lloyd*, [1895] 2 Q. B. 610.
(*l*) *Swan* v. *Stransham* (1564), Dyer 257, a; *Adams* v. *Gibney* (1835), 6 Bing. 656; *Penfold* v. *Abbott* (1862), 32 L. J. Q. B. 67.
(*m*) *Baynes* v. *Lloyd*, *supra*.
(*n*) *Hyde* v. *Warden* (1877), 3 Exch. D. 72, at p. 80.
(*o*) *Reeve* v. *Berridge* (1888), 20 Q. B. D. 523.
(*p*) *Cosser* v. *Collinge* (1832), 3 My. & K. 283.
(*q*) *Flight* v. *Benton* (1832), 3 My. & K. 282.

And upon a contract to grant a lease (not saying that it is to be an underlease), the lessee must take with the usual covenants, but not with unusual covenants (*r*).

(2) As between the purchaser and third parties.

And, Secondly, and precisely because the contracting party may (before completing) withdraw from his contract, on discovering the *unusual* provision (*s*),—therefore, if he complete, then as between himself and every person interested in (and entitled to the enforcement of) the *unusual* provision (or restrictive covenant), he will be bound by it, at the suit of such party, whether he has had the opportunity of inspecting the lease or not (*t*),—unless, *semble*, he could not (upon any reasonable investigation of the title) have obtained a knowledge of the unusual provision before completing his contract; but if he had, in fact, no notice of the unusual provision, and if constructive notice of it cannot be imputed to him, then, *semble*, he will only be bound by it, if it is a provision of a kind to run with the land at *law* (*u*).

Effect of obtaining *legal* estate,—being without notice.

Apparently, when a man purchases for value an estate which is subject to a restrictive covenant, and he is without actual notice of the covenant, and constructive notice of it cannot be imputed to him, then if he gets the legal estate upon his purchase, he takes free of the covenant (*x*); but if he take only the equitable estate, then he is bound by the covenant, whether he has notice of it or not (*y*).

(*f*.) COVENANTS REAL,—AND COVENANTS PERSONAL OR COLLATERAL ONLY.

Personal covenant, breach of,—liability for, as between executor and the heir or devisee.

In *Sprake* v. *Day* (*z*), where a man had entered into a *personal* contract for the erection of buildings on certain parts of his estate, and he died leaving the buildings still incomplete, having devised the estate specifically to the defendants and having appointed the plaintiff his executor,—the court held, that the plaintiff (as executor) was liable to pay for the buildings out of the testator's personal estate, so far as the expense of erecting them had not been paid by the testator himself before his death; and the decision purported to follow the somewhat

(*r*) *Propert* v. *Parker* (1832), 3 My. & K. 280.
(*s*) *In re Cox and Neve's Contract*, [1891] 2 Ch. 109.
(*t*) *Patman* v. *Harland* (1881), 17 Ch. D. 353.
(*u*) *Wilson* v. *Hart* (1866), L. R. 1 Ch. App. 463.
(*x*) See per JESSEL, M.R., in *London and South Western Rail. Co.* v. *Gomm* (1882), 20 Ch. D. 562, at p. 583.
(*y*) *Ibid.*
(*z*) [1898] 2 Ch. 510.

similar decision in *Cooper* v. *Jarman* (*a*), where the landowner who had entered into the building contract had died intestate and his administrator had paid for the subsequent completion of the buildings,—having no alternative between permitting the completion or else paying to the building contractors damages for breach of his testator's building contract.

Covenants preparatory to the relation of landlord and tenant,—and covenants incident to that relation distinguished.

In *Eccles* v. *Mills* (*b*), where J. J. made a lease for fourteen years of the M. estate at a rent of 1,000*l.* per annum ; and some four months afterwards he made his will, whereby he devised the M. estate specifically to the predecessors in title of the plaintiff (or appellant) Eccles, and gave his residuary estate to (in effect) the defendant (or respondent) Mills ; and he died some three months afterwards ; and in an action by the lessee against the executors of the testator for breach of a covenant of the testator contained in the lease, a considerable sum (2,300*l.*) was recovered ; and the executors paid the lessee that sum in satisfaction of the judgment, and for that purpose took it out of the residue of the testator's estate ; and Mills claimed that, *as between him and Eccles*, the amount should have been paid out of the M. estate, the covenant in question having been a covenant to lay down (or to finish laying down) in good English grass within a year one thousand acres (part of the four thousand acres constituting the M. estate comprised in the lease),—The court said, that the M. estate was not liable in exoneration of the residuary estate,—*scil.*, because the covenant, on its true construction and having regard to the surrounding circumstances, was a *personal* covenant of the testator not incident to (but preparatory to) the relation of landlord and tenant of the M. estate, and was not a covenant the burden of which ran with the reversion in the M. estate. But even if the covenant had run with the reversion in the M. estate (and it would, save for the special circumstances, have done so), the court said, that the covenant was not a burden (in the nature of a *charge*) on the reversion in the lifetime of J. J., and was therefore not a burden (in the nature of a *charge*) on that reversion in the hands of Eccles or of his predecessors in title ; and although, *for the benefit of the lessee*, Eccles and his predecessors in title were liable on the covenant, still the residuary estate of the testator was also liable. And in order to decide, *as between the specific estate and the residuary estate*, that the specific estate was liable in exoneration of the residuary estate, it was

(*a*) (1866), L. R. 3 Eq. 98. (*b*) [1898] A. C. 360.

necessary to show that the covenant was incident to the relation of landlord and tenant (*c*); and the covenant, being a covenant "*to be performed forthwith, and not to remain attendant on the lease during its currency*," was clearly preparatory to the relationship of landlord and tenant (or a condition of that relationship arising or commencing), and was not an incident of that relation arisen or commenced; or, in other words, the performance of the covenant was not a condition *of* the relationship but a condition *to* the relationship (*d*). But if the covenant had been attendant on the relationship during the currency of the lease,—with a recurrent operation,—the M. estate would have been liable in exoneration of the residue,—*scil.*, because, in such latter case, the covenant would have been *incident to the relation of landlord and tenant* (*e*).

Collateral covenants,—where inextricably mixed up, with real covenants,—are (in effect) real.

In *Lord Hastings* v. *North Eastern Rail. Co.* (*f*), the plaintiff's predecessor in title had demised to the defendant company's predecessors for 1,000 years a way-leave over his estate, reserving to himself, his heirs and assigns, an uncertain rent calculated on the tonnage of coal, etc., carried (and an uncertain rent calculated on the number of passengers carried) on the defendant company's lines,—*scil.*, over (and by means of the way-leave on) the lessor's estates; and the court held, that the way-leave was an incorporeal hereditament, capable of being limited (and a rent in respect of which could be reserved) to the heirs and assigns of the lessor,—following in this respect *Martyn* v. *Williams* (*g*) and *Norval* v. *Pascoe* (*h*). And it appearing that (on the construction of the demise) the tonnage rent in respect of coal, etc., was to be calculated (and paid) in respect even of coal carried on the defendant company's lines, although not over the lands of the plaintiff, the court said that such rents, having been portion of the consideration for the demise, were also well reserved to the heirs and assigns of the lessor.

(*g.*) COVENANTS RUNNING WITH THE LAND,—AT LAW AND IN EQUITY.

Covenants running with the land,—

The covenants in a mining lease (not being merely collateral covenants) will, in general, run with the land (*scil.*,

(*c*) *Mansel* v. *Norton* (1883), 22 Ch. D. 769.

(*d*) *Marshall* v. *Holloway* (1832), 5 Sim. 196; *Armstrong* v. *Burnet* (1855), 20 Beav. 424.

(*e*) *Fitzwilliams* v. *Kelly* (1852), 10 Ha. 266; *Hawkins* v. *Hawkins* (1880), 13 Ch. D. 470.

(*f*) [1898] 2 Ch. 674; [1899] 1 Ch. 656.

(*g*) (1857), 1 H. & N. 817.

(*h*) (1864), 34 L. J. Ch. 82.

with the mines), so as to bind the assigns of the lessee. Thus, where in a lease of mines and smelting mills, it was recited, that the lessees had agreed to take down a certain old smelting mill, and to erect a new mill of larger dimensions in a different situation but on the same waste lands on which the old mill was situate ; and the lessees covenanted to keep and deliver up at the end of the term in good repair the new mill to be erected,—which keeping up implied (even if the recital did not imply) a covenant to erect the new mill,—the court held, that the covenant ran with the land, so as to be available for the assignee of the reversion,—*scil.*, because it (the covenant) was conceived for the support and maintenance of the subject-matter of the demise (*i*). So also, where in an agreement for a lease of land for a railway, the lessees agreed to carry all the coals from a certain colliery, and all the coal from any other mines to be worked by them in a certain township, and to pay a way-leave or rail-rent of 2*d.* per ton ; and certain assignees of the railway and the mines refused to pay the rail-rent for any other coal than that raised from the specified colliery, and they used another railway for the coal raised from the other mines,—the court held, that the covenant ran with the land, so that the assignees had to pay the rail-rent for all such last-mentioned coals as well (*k*).

(1) Covenant to leave in repair.

(2) Covenant to pay way-leave rent.

In *Aspden* v. *Seddon* (*l*), the mines had been excepted upon a fee simple grant of the surface ; and annexed to the exception there was expressly given the right or liberty to get and carry away the mines (but by underground workings only), the right being qualified by the words following, namely,—"so that compensation in money be made by the grantor his heirs and assigns for all damage occasioned through or in consequence of the exercise of the excepted liberty" ; and it appeared that the grantee of the surface had assigned, and that the grantor (the mineral-exceptee) had also assigned,—but the court held, that for the damage occasioned by the assignee's exercise of the excepted liberty he was liable, and that he was liable to the assignee of the surface-grantee,—and apparently, upon the ground that the payment of the compensation was an incident annexed to the exercise of the excepted liberty, and was (in effect) a covenant running with it.

(3) Covenant to pay compensation,—annexed to license.

(*i*) *Sampson* v. *Easterby* (1829), 9 Barn. & C. 505 ; 1 C. & J. 105.

(*k*) *Hemmingway* v. *Fernandez* (1842), 12 L. J. (N.S.) Ch. 130 ; *Williams* v. *Earle* (1868), L. R. 3 Q. B. 739.

(*l*) (1876), 1 Exch. D. 496.

(3*a*) Covenant of exemption from liability to pay compensation.

And if the law were otherwise, it would (the court said) be shocking,—an opinion which need not be controverted ; but the specific contention in that case was, not that the assignee of the surface-grantee should not have compensation for the damage, but that the original grantor and his heirs (and not his assigns of the excepted minerals) were the parties liable to the surface-owner for the compensation,—a contention very difficult doubtless to establish, but which seems not inconsistent with what has been decided in other cases (*m*). Moreover, a total exemption from paying compensation for damage occasioned by the exercise of mining rights runs with the land (*n*) ; as does also a qualified exemption, the burden being otherwise provided for (*o*).

(*h.*) NOTICE, EFFECT OF, IN EQUITY.

Covenants which do not run at law,—are not to run in equity, merely because the assignee has notice of them ;

In *Keppell* v. *Bailey* (*p*), where the Kendalls, as owners of certain ironworks (called the Beaufort works), entered into an agreement with certain third parties (owners of other ironworks and lands) for the joint construction of a railroad, and covenanted for themselves and their assigns (of the Beaufort works) to take from the quarry all the limestone required at their works, and to carry all such limestone (and also all the ironstone or iron-ore gotten out of their mines) along the railroad to their works, paying the specified mileage rate ; and the covenantors afterwards assigned the Beaufort works to the defendants, who had full notice of the assignors' covenant, but who maintained that the covenant was not binding on them as assigns of these works,—*scil.*, because the burden of it did not run with the works, in favour of the covenantees (owners of other independent hereditaments), and the notice of it could not make it binding on them,—The court held, that the defendants were not bound by the covenant, BROUGHAM, L.C., observing :—" Assuming that the Kendalls covenanted for their assigns of the Beaufort works,—could they by such a covenant, with parties who had no relation whatever to those works except that they had a lime quarry and a railway in the neighbourhood, bind all persons who should, whether by purchase or by descent, become owners of those works, to at all times buy

(*m*) *Keates* v. *Lyon* (1869), L. R. 4 Ch. App. 218 ; *Haywood* v. *Brunswick Benefit Building Society* (1881), 8 Q. B. D. 403 ; *Austerberry* v. *Oldham* (*Corporation*) (1885), 29 Ch. D. 750.

(*n*) *Gill* v. *Dickinson* (1880), 5 Q. B. D. 159.

(*o*) *Bell* v. *Dudley* (*Earl*), [1895] 1 Ch. 182.

(*p*) (1834), 2 My. & K. 517.

their lime at the quarry and to at all times carry their iron on the railway? Or could they do more than give the covenantees a right of action against themselves for any breach of their covenant? Looking first at the principle of the thing: There are, of course, certain known incidents to property and its enjoyment,—*e.g.*, certain burthens, wherewith it may be affected or rights which may be created and enjoyed over it by parties other than the owner,—all which incidents are recognized by the law. But it must not therefore be supposed, that incidents of a novel character may be attached to property at the caprice of the owner; for although there can be no harm in allowing the fullest latitude to men in binding themselves and their representatives to answer in damages for the breach of their obligations, great inconvenience and detriment would arise, if parties were allowed to impress upon their lands and tenements, novel and unaccustomed incidents of enjoyment, which should follow them into all hands, however remote. Every close, every messuage might, if that were permitted, come to be held in some singular fashion, and it would hardly be possible to know what rights the acquisition of any parcel conferred or what obligations it imposed. A right of way or of common is of a public as well as of a simple nature, and no one who sees the premises can be ignorant of what all the vicinage knows; but if one landowner may bind his messuage and land to take lime from some particular kiln, another may bind his to take coals from some particular pit, while a third may load his property with the further obligation of, *e.g.*, employing one blacksmith's forge! There is also a great difference between the covenant of an independent fee simple owner as in the present case and the covenants and provisions contained in a lease, whereby the demised premises may be subjected to certain rights in favour of the lessor; for the lessor (or his assignee) continues in the reversion while the term lasts; and it is not at all inconsistent with the nature of property, that certain things should be reserved to the reversioner while the term continues, such reservation being in the nature of an exception out of the enjoyment granted, and the enjoyment returning to him again (the full enjoyment returning wholly to him again) when the demise is at an end. Yet even in the case of leases, the law does not leave the reversioner an absolute license as to the covenants which shall affect the land in the hands of the assigns; but these covenants must be of such a nature as '*to inhere in the land*,' or '*concern the land demised*'; or the particular covenant must be "*quo-*

neither as between independent fee simple owners;

dammodo annexed and appurtenant to the land" ; or it must '*tend to support*' the reversioner's estate in the land demised. Within any such limits as these, restraints upon the land demised may be imposed which shall follow the land into the hands of persons who are strangers to the contract of lease, and who only become privy to the lessor through the estate which they take by assignment; that is to say, within such limits as those indicated, a landowner may retain to himself and his assigns of the reversion a certain control over, or a certain use of, the property demised ; and he may so retain that limited control or use into whose hands soever as lessee or assignee the temporary possession of the land may come ; but even in the case of leases, if the landlord should exceed those limits and should invent some novel and unusual stipulation, the covenant in which he should embody it would only bind the covenantor himself and his representatives in case of breach, but would not run with the land, so as to bind his assigns."

And his lordship continued as follows :—" A careful examination of the decided cases confirms the view above expressed, and shows that there would be considerable difficulty in holding such a covenant as the one in question to run with the land, even if there existed between the original parties to it that privity of estate which holds between the lessor or his assigns and the assigns of the lessee ; and, in fact, the decided cases, taken altogether, are adverse to such a covenant being real and inherent, even in cases where there is such privity ; and where no such privity can be pretended to exist, as in the present instance, the covenant is plainly collateral and binds not the assigns.

nor even as between lessors and lessees.

And such being the true construction at law, does the notice which the purchaser had of its existence alter the case in a court of equity ? Certainly not ; for observe how such a doctrine (if admitted) would apply in the case of leaseholds. Every assignee of the lease has notice of the covenants ; and consequently there could be no covenant, how absurd soever, which would not (if notice was to bind) run with the land in equity into whose hands soever the land might come ; and all the decisions of the courts of law with respect to such covenants, being collateral or in gross, would be of no avail,—because though no damages could be recovered for the breach of them, yet the performance of them could be enforced in a court of equity against every assignee of the lessee,—*scil.*, because he would necessarily be fixed with notice of the covenant. And,

similarly, a person who had conveyed land, and subjected it to covenants in the hands of his vendee, could at once make sure of those burthens following it into the hands of all holders to whom it might pass, by taking the precaution of notifying the covenants in some effectual, though easy, manner ; but, in fact, a court of equity will not, by injunction or in any other way, enforce such covenants, when satisfied that (as against the assignee) they would receive no support or countenance at law."

The covenant which is to run in equity, on the ground of notice, must be a restrictive covenant.

And the decision in *Keppell* v. *Bailey*, *supra*, appears to be now accepted law ; for, as stated in *Haywood* v. *Brunswick Benefit Building Society* (*q*), it is only covenants restricting the use of land which (when they are not binding at law on the assignee of the covenantor) will be enforced in equity against such assignee on the ground of notice ; or, as stated in *Austerberry* v. *Oldham* (*Corporation*) (*r*), upon a covenant to expend money in repairs, if the covenant is not binding at law on the assignee, and especially when the question is one between independent fee simple owners (and not between landlord and tenant, lessor and lessee), then the covenant (unless it be restrictive of the use of the land of the covenantor) does not bind the assignee of the covenantor on the ground of notice, but is a merely personal covenant binding on the covenantor himself and on his estate.

These decisions have therefore definitely limited the application of the principle of *Tulk* v. *Moxhay* (*s*) to covenants which are restrictive of the use of the land of the covenantor ; and when such restrictive covenants, not being expressed to be for the covenantor and his assigns, do not bind the assigns at law, they will continue to bind in equity those assigns upon the ground of their having had notice of them before or at the date of their purchases of the land ; but other covenants will not do so, either on that ground or on any other ground,—*scil.*, when they are not binding at law on the assignee. So that the first question must invariably be, whether the covenant is binding at law on the assignee ; and if it is binding at law, it is unnecessary to have recourse to the equitable doctrine of notice (*t*) ; and if it is not binding at law on the assignee, then, on the ground of notice, it will or will not be binding in equity

(*q*) (1881), 8 Q. B. D. 403.
(*r*) (1885), 29 Ch. D. 750.
(*s*) (1848), 2 Phill. 774.
(*t*) *Aspden* v. *Seddon* (1876), 1 Ex. D. 496.

on the assignee, according as it is or is not a covenant restrictive of the free user of the land of the covenantor.

And the assign, who is to be bound in equity, must be an assign of the demised land itself.

In *Keppell* v. *Bailey* (*u*), where the lease was of ironworks and ironstone, and the defendant was the assignee of the lease ; and the original lessee had for himself and his executors, administrators and assigns, covenanted with the plaintiff (and others) that all the limestone which should be used at the works should be procured from a specified limestone quarry and should be carried (at a specified way-leave toll) over and along a certain railway (which had been constructed by or at the expense of the lessee and of the plaintiff and others),—the lessee and the plaintiff and the others being all independent owners (save that they were co-proprietors of the railway) ; and the plaintiff sued the defendant for breach of that covenant, and asked for an injunction to restrain the continued breach of it,—the court said, that it was not a covenant which ran with the works so as to bind the assignees thereof, *not concerning or affecting the works or the mode of their enjoyment, but being merely collateral thereto.* Moreovor, the covenant in question in that case, was not contained in the lease of the ironworks and ironstone at all, but was contained in an independent document, namely, in the agreement under which the line of railway was constructed,—so that the assigns intended by the covenant were (in fact) the assigns of the covenantor's interest in the railway ; and the defendant was not the assign of that interest, but was an assign of the ironworks and ironstone only.

(*i.*) ASSIGNEES OF LICENSEES, LIABILITY OF.

Assignee of licensee,—liable, equally with original licensee,—while he uses the license :

A licensee appears, however, to be (in that particular) differently situated to a lessee ; for a license being but an authority, if the licensee should agree with another for the latter to have and enjoy the liberty conferred by the license, such agreement would (or might) as well at law as in equity amount to a legal grant or assignment of the license,—so as to make the person who, by virtue of such agreement, exercised the liberty liable to pay the rent or quasi-rent annexed to the exercise of the license (*x*). And this distinction between a lease and a license may possibly explain the decision in

(*u*) (1834), 2 My. & K. 517.

(*x*) *Great Western Rail. Co.* v. *Rous* (1870), L. R. 4 H. L. Cas. 650.

Clavering v. *Westley* (*y*), where the *cestuis qui trustent* had mined in pursuance of the liberties in that behalf granted to the lessee as a trustee for them, and were held liable for so long as they had exercised such liberties ; and it may explain also the decision in *Wright* v. *Pitt* (*z*), which was a similar case, and in which in fact a license and a lease were for this purpose distinguished. In other words, the action for an account in equity may well lie, when the action of debt at law would not lie,—against an equitable assignee in respect of (and to the extent of) his exercise of a mining license, or of the liberties of mining contained in a mining lease.

(1) For the rent annexed to the license ;

In *Martyn* v. *Williams* (*a*), the defendant was the grantee (for twenty-one years) of a certain license to dig for and get china clay, the license granting also incidental surface rights ; and the licensee covenanted to pay compensation for surface damage, and to deliver up in good repair at the end of the term ; and the plaintiff was the assignee of the licensor, and sued the defendant (1) for certain surface damage (to be compensated therefor), and (2) for damages for not leaving in repair at the end of the term ; but it appearing, that the surface damage for which he claimed the compensation had been done *before the plaintiff became assignee*, he was held not entitled to recover in respect of that ; but he recovered the damages for breach of the covenant to deliver up in repair,—the court observing, that the conveyance to the plaintiff did not pass to him the right of the original grantor to the compensation for surface damage done in his (the grantor's) time,—which right remained therefore with the grantor ; but that it did pass to the plaintiff the right to sue for the breach of covenant to leave in repair, the 32 Hen. 8, c. 34 extending to incorporeal hereditaments equally as to corporeal hereditaments, both classes of hereditaments being *tenements* within that Act (*b*).

and (2) upon the covenant to leave in repair.

(*k.*) COVENANTS GENERALLY, REASONABLE INTERPRETATION OF.

Clifford v. *Watts* (*c*), was a lease of clay ; and the lease reserved no minimum rent, but reserved a royalty of so much on every ton of clay gotten ; and the lessee covenanted to

Covenant to work,—construed as regulating

(*y*) (1735), 3 P. Wms. 402.
(*z*) (1870), L. R. 12 Eq. 408.
(*a*) (1857), 1 H. & N. 817.
(*b*) *Muskett* v. *Hill* (1839), 5 Bing. N. C. 694.
(*c*) (1870), L. R. 5 C. P. 577.

only the rate of working, where no mineral to be gotten.

effectively dig and search for the clay, and to raise and get not less than 1,000 tons (nor more than 2,000 tons) per annum, and to pay the royalty thereon,—but the lessee, although he effectively dug and searched, yet found no clay ; and the court said, that (according to the true intention of the lease) the presence of clay in the land was a condition precedent to the lessee's covenant to raise and get 1,000 tons per annum, and that covenant therefore was (in effect) discharged by there being no clay in the land. For (as the court observed) the lessee had not covenanted (as in *Bute* v. *Thompson*) (*d*) for the payment of any minimum rent, whether he worked and got clay or not ; and the case was more like to *Quarrington* v. *Arthur* (*e*), where the covenant was not to work the mines under the lands demised, *but only such of them as should first have been found or discovered* ; and the covenant to raise and get 1,000 tons was *merely a mode of regulating the rate of working*, and was not an indirect mode of covenanting to secure the payment of a minimum rent.

Covenant for quiet enjoyment,—construed as limited to matters reasonably in contemplation.

In *Harrison* v. *Muncaster* (*f*), the plaintiff was the lessee of an iron-mine from the defendant ; and in the lease there was the usual covenant on the lessor's part for quiet enjoyment by the lessee ; and it appeared, that, prior to leasing to the plaintiff, the defendant had let to X. an adjoining mine on a lower level ; and that X., while working his mine according to the liberties in his lease, had liberated a great body of underground water, which flooded X.'s mine, and (rising in the levels there) found its way into the plaintiff's mine through a natural fissure in the strata, whereby the plaintiff's mine also was flooded and damaged ; and the plaintiff sued the defendant for breach of the covenant for quiet enjoyment,—But the court, finding that the existence of the underground water had been unsuspected by everyone, and that the irruption of the water could not have been foreseen, and was not a circumstance which the lessor was under any duty to foresee, held, that there was no breach of the covenant, the damage (or flooding) not being attributable to any direct act of the defendant,—*scil.*, the damage was altogether too extraordinary to have been within the contemplation of either the lessor or of the lessee at the date of the lease ; and so it did not, in the view of either of them, fall within the covenant as contemplated at the time.

(*d*) (1844), 13 Mee. & W. 487.
(*e*) (1842), 10 Mee. & W. 335.
(*f*) [1891] 2 Q. B. 680.

(*l.*) COVENANTS FOR TITLE; AND FOR QUIET ENJOYMENT; AND FOR FURTHER ASSURANCE.

(1) Covenant for title,—breach of, when complete.

A covenant for title, if broken, is broken once for all,—and is broken at once on the execution of the conveyance in which the covenant is; and the cause of action is therefore at once complete, and time will run as from the date of the execution of the conveyance itself (*g*).

(2) Covenant for quiet enjoyment,—successive breaches of.

A covenant for quiet enjoyment, if broken, is broken when (and as often as) there is any disturbance of the enjoyment,—the disturbance being, of course, a legal disturbance; and there will be as many successive actions as there are successive disturbances,—the cause of action in each case being only complete on the disturbance happening; and the time will run against each action only as from the date that the disturbance sued on shall have happened (*h*).

(3) Covenant for further assurance,—breach of.

The covenant for further assurance, if broken, is broken upon demand for (and refusal to execute) the document whereby the lands are to be further assured,—and upon every reasonable demand, if there is a refusal to comply therewith, there is a fresh breach of the covenant; and for every successive breach there is a right of action,—the time running against each action only as from the date of the refusal of compliance with the demand (*i*).

Covenant for quiet enjoyment,—may be unqualified, even when covenant for title is qualified.

In *Howell* v. *Richards* (*k*), where the words of the covenant for title were qualified in the usual way (that is to say, were limited to the acts and omissions of the covenantor), but the words of the covenant for quiet enjoyment were unqualified and unlimited,—the court held the latter covenant to be a distinct covenant, and said that it was not limited by reference to the limitations contained in the former covenant,—and for this reason, because the covenant for title would be at once broken, if there was at the time of the conveyance any defect of title however slight, although time would (or might) cure it; whereas the covenant for quiet enjoyment not being broken until the enjoyment was actually disturbed, the defect might meanwhile be cured.

(*g*) *Spoor* v. *Green* (1874), L. R. 9 Exch. 99, at pp. 110, 111, explaining *Kingdon* v. *Nottle* (1815), 1 M. & S. 355; 4 M. & S. 53.

(*h*) *Spoor* v. *Green* (1874), L. R. 9 Exch. 99.

(*i*) *Ibid.*

(*k*) (1809), 11 East, at pp. 641—644.

Lessor's covenant for quiet enjoyment,—invariably qualified.

In a mining lease (as, in fact, in every ordinary lease), the covenant for quiet enjoyment is, in general, the only covenant entered into by the lessor,—that is to say, the lessor enters into that covenant, but not into any covenant for title; and the covenant on the lessor's part for quiet enjoyment is invariably qualified (*l*).

Covenant for quiet enjoyment,—what is, and what is not, a breach of.

Every disappointment which a tenant meets with, or experiences, in the course of his enjoyment of the demised premises, is not a disturbance of that enjoyment within the meaning of the covenant for quiet enjoyment; and *e.g.*, if he find a farm not drained, or a mine not unwatered, which was represented to be drained or unwatered, that is not a disturbance (*m*). And so also, a mere temporary inconvenience to the enjoyment,—which does not affect either the title of the lessee or his possession,—is not a breach of the covenant for quiet enjoyment (*n*). But a "structural damage" would be a breach of that covenant (*n*); and, generally, anything which interfered with the title to, or with the possession of, the property demised would be a breach of the covenant (*n*). And as regards an interruption of the ordinary enjoyment of the land demised, any substantial interference with that would be a breach of the covenant (*o*),—*scil.*, because it is (to some extent) an interference both with the title and with the possession. But apparently, there will be no breach of the covenant, unless either the title or the possession is interfered with,—and, in particular, this covenant does not amount to a warranty that the land demised may be lawfully used for any purpose whatsoever (*p*); nor does it amount to a warranty of support (*q*); or to a warranty against accidents,—for example, against an irruption of water attributable to a mere *accident* happening in the lawful and proper working of an adjoining mine (*r*).

But if the irruption of the water is a consequence naturally following upon or flowing from any act of the lessor (*s*) or from any lawful act of the person claiming under him (*t*), it

(*l*) *Dennett* v. *Atherton* (1872), L. R. 7 Q. B. 316.
(*m*) *Clarke* v. *Yorke* (1882), 52 L. J. Ch. 32.
(*n*) *Manchester, Sheffield and Lincolnshire Rail. Co.* v. *Anderson*, [1898] 2 Ch. 394.
(*o*) *Sanderson* v. *Berwick-upon-Tweed* (*Mayor*) (1884), 13 Q. B. D. 547.
(*p*) *Morgan* v. *Hunt* (1690), 2 Vent. 213; *Spencer* v. *Marriott* (1823), 1 B. & C. 457; *Dennett* v. *Atherton* (1872), L. R. 7 Q. B. 316.
(*q*) *Dennett* v. *Atherton, supra.*
(*r*) *Harrison* v. *Muncaster*, [1891] 2 Q. B. 680.
(*s*) *Andrews* v. *Paradise* (1724), 8 Mod. 318; *Anderson* v. *Oppenheimer* (1880), 5 Q. B. D. 602.
(*t*) *Shaw* v. *Stenton* (1858), 2 H. & N. 858; *Sanderson* v. *Berwick-upon-Tweed* (*Mayor*) (1884), 13 Q. B. D. 547.

will be a breach of this covenant. And therefore, in *Shaw* v. *Stenton* (*u*), where the defendant leased a coal mine to the plaintiff, and covenanted for quiet enjoyment; and afterwards the defendant excavated a quarry of ironstone situate above the demised mine, and made holes from the ironstone into the demised mine,—and thereby caused water to enter into, and also disturbed the roof of, the demised mine,—the court said, that the covenant for quiet enjoyment had been broken; and it was immaterial, for that purpose, whether the defendant's acts were rightful or were wrongful.

Support, right of,—not warranted.

The covenant for quiet enjoyment not amounting to a warranty that the land demised may be lawfully used for any purpose whatsoever (*x*), therefore the covenant does not warrant, that the site sold (or leased) for the erection of a house thereon has not been already so undermined as to render it impossible to build a house on it (*y*).

Railway company being assignee,—liability of, for breach of the covenant for quiet enjoyment.

Where a railway company acquires (compulsorily or by agreement) the reversion upon a lease of lands, and in the lease there is the usual covenant for quiet enjoyment by the leasee, the railway company is bound by that covenant; but if the railway company, in the due exercise (the reasonable and careful exercise) of their statutory powers, commit any damage to the lands comprised in the lease, the liability to pay for such damage is a liability the damages for which are to be assessed and recovered as compensation under the Railways Clauses Consolidation Act, 1845, and the Lands Clauses Consolidation Act, 1845, and not as damages properly so called which would be recoverable only in an action (*z*); *secus*, if the damages should have arisen from some excess of (or negligent exercise of) the statutory powers of the railway company.

(*m.*) IMPLIED COVENANT FOR QUIET ENJOYMENT, ETC.

Covenant,—when implied: (*a*) for quiet enjoyment;

A covenant for quiet enjoyment will be implied from the use of the word *demise* (*a*),—unless where it is manifest, on the face of the lease itself, that the lessor (being, *e.g.*, a mortgagor) has not the legal estate at the date of the demise (*b*); but

(*u*) (1858), 2 H. & N. 858.
(*x*) *Morgan* v. *Hunt* (1690), 2 Vent. 213; *Spencer* v. *Marriott* (1823), 1 B. & C. 457; *Dennett* v. *Atherton* (1872), L. R. 7 Q. B. 316.
(*y*) *Dennett* v. *Atherton*, *supra*.
(*z*) *Manchester, Sheffield and Lincolnshire Rail. Co.* v. *Anderson*, [1898] 2 Ch. 394.
(*a*) *Hall* v. *City of London Brewery* (1862), 2 B. & S. 737.
(*b*) *Smith* v. *Pocklington* (1831), 1 Cromp. & J. 445.

a covenant for title will not be implied from the use of that word (*c*).

(*b*) for payment of rents, etc.;

Where a lessee assigns the lease to B., and the assignment is expressed to be *subject to the rents and covenants*, and B. gives no express covenant to pay the rents and to perform the covenants, there is an *implied* covenant on his part to that effect,—*scil.*, during the continuance of his estate only, and not afterwards (*d*).

(*c*) for leaving specified coal unworked;

A covenant will also (sometimes) be *implied* from a mere recital in the lease (*e*),—provided the intention of the parties should be that the recital should have that effect, but not otherwise (*f*); and no technical words are necessary, if that intention appears (*g*); for example, a covenant to work out all the coal (except some specified part) would amount to a covenant not to work or get the coal in the part excepted (*h*).

Implied covenant for quiet enjoyment,—duration of.

The covenant for quiet enjoyment which is implied by law from the word *demise* determines with the estate of the covenantor (*i*).

Upon the covenant for quiet enjoyment which is implied from the word *demise*, the lessee may recover for an eviction, whether the eviction be by the lessor himself or those claiming under him, or be by some one having a prior title to the lessor (*k*); but upon the express covenant for quiet enjoyment,—if that covenant is (and it usually is) limited to the acts of the lessor and those claiming under him, the lessee would not be entitled to recover in respect of an eviction by *prior* title (*l*),—*scil.*, not being a title created by the lessor himself.

(*n.*) Lessees and Successive Assignees,—Mutual Relations of.

Assignee,—the lessee, a surety for,—

A lessee (after assigning the lease) stands in the position of a surety towards his assignee, and the assignee is regarded as

(*c*) *Bandy* v. *Cartwright* (1853), 8 Exch. 913.

(*d*) *Steward* v. *Wolveridge* (1833), 1 C. & M. 644.

(*e*) *Barfoot* v. *Treswell* (1666), 3 Keb. 465; *Farrall* v. *Hilditch* (1859), 5 C. B. (N.S.) 840; *Lay* v. *Mottram* (1865), 9 C. B. (N.S.) 479.

(*f*) *Cannock* v. *Jones* (1849), 3 Exch. 233.

(*g*) *Courtney* v. *Taylor* (1843), 7 Sco. N. R. 749.

(*h*) *St. Albans* (*Duke*) v. *Ellis* (1812), 16 East, 352.

(*i*) *Adams* v. *Gibney* (1830), 6 Bing. 656; *Baynes* v. *Lloyd*, [1895] 1 Q. B. 820; [1895] 2 Q. B. 610.

(*k*) *Nokes's Case* (1598), 4 Rep. 80 b; Cro. Eliz. 674.

(*l*) *Line* v. *Stephenson* (1838), 5 Bing. N. C. 183; *Morril* v. *Frame* (1812), 4 Taunt. 329.

(1) Impliedly;

the principal debtor (*m*),—*scil.*, during the continuance of his (the assignee's) own estate. For such assignee takes subject to the rents and covenants while he so enjoys the estate (*n*); and there is, in fact, an *implied* promise on the part of each assignee (whether immediate or ultimate) to the original lessee, that he (the promiser) will, during his own estate, pay the rents and perform the covenants (*o*); but this principle is only applicable to an assignee properly so called, and not to (*e.g.*) an underlessee (*p*).

or (2) Expressly.

In *Crossfield* v. *Morrison* (*q*), where the lessee of a coal-mine assigned it to A. for the whole residue of the term; and A., as assignee, covenanted with the lessee to pay, *during all the period of his* (*A.'s*) *possession of the mine*, the rents and royalties and way-leaves which should *during that period* become and be payable; and also covenanted with the lessee to *at all times thereafter* indemnify him and his estate against the rents, royalties, and way-leaves reserved or made payable by the lease, —the court held, that the latter covenant (that for the indemnity of the assignor) was not limited to the rents, royalties, and way-leaves which became and were payable *during the period of A.'s possession*, but was general, and included those which had become payable after A.'s possession had ceased.

Successive assignees,—are mutual sureties.

In *Moule* v. *Garrett* (*r*), where the plaintiff was the lessee of certain premises, and as such had covenanted to keep the premises in repair; and he had assigned the lease to B., who covenanted to indemnify him against the covenant; and B. assigned the lease to the defendants, who covenanted to indemnify B. in like manner; and the defendants neglected to repair,—whereupon the lessor recovered damages against the plaintiff for breach of the covenant, and the plaintiff sued the defendants to recover the amount so paid,—the court said, that the defendants were liable to the plaintiff,—because there is an *implied* promise on the part of each successive assignee of a lease to indemnify the lessee against any breach of the covenant to repair committed by the assignee during the continuance of his (the assignee's) estate,—which implied promise is additional to (and not excluded by) the express covenant of indemnity which each assignee enters into with his own assignor.

(*m*) *Burnett* v. *Lynch* (1826), 5 B. & C. 589; *Humble* v. *Langston* (1841), 7 Mee. & W. at p. 530.

(*n*) *Wolveridge* v. *Steward* (1833), 1 C. & M. 644.

(*o*) *Moule* v. *Garrett* (1870), L. R. 5 Exch. 132; L. R. Exch. 101.

(*p*) *Bonner's Case*, [1899] 1 Q. B 161.

(*q*) (1849), 7 C. B. 286; 18 L. J. (N.S.) C. P. 135.

(*r*) *Supra*.

And similarly, the assignees of a license.

In *Martyn* v. *Williams* (*s*), the right granted under the license (which was by deed) was a right to dig for and carry away china-clay, and to erect works incidental thereto on certain specified surface lands ; and the court said, that such a right was an incorporeal hereditament, a property capable of being assigned to a purchaser or otherwise conveyed away (*t*) ; and whether or not the licensor had a reversion upon the license like he would have had upon the grant of a lease for years, was of no consequence so far as regarded any question as to the covenants contained in the deed running with the licensor's estate or not.

(*o.*) DAMAGES BEFORE AND AFTER SALE OR LEASE.

Damages, before and after sale,—title to.

Where lands have been damaged by mining operations, and the lands are *afterwards* sold and conveyed to a purchaser, the claim for the damages does not pass to the purchaser,—*scil.*, by force merely of the conveyance of the lands. And apparently, the law would be the same, where the claim to the damages is made under a covenant contained in a (mining) lease or (mining) license,—and the benefit of which covenant runs with the lessor or licensor's estate in the lands,—for as regards the compensation for damages accrued *before* the purchase, the benefit of the covenant does not run (*u*),—but only as regards the compensation accrued *since* the purchase. But if there is also a covenant to deliver up the works in repair at the end (or upon the sooner determination) of the term, the purchaser would have the benefit of that (*x*).

Damage,—liability for, of lessor or of lessee.

Where a man is the owner of a building which has a chimney stack, and the chimney stack from being left in a ruinous state of decay falls over upon and injures adjoining premises, the owner of the stack will be liable for that injury to the adjoining owner,—and will not be able to exempt himself, by showing that the building (with the stack) was in lease to another at the time of the falling over, if the stack already was (at the date of the lease) in a ruinous state (*y*),—*secus*, if it became ruinous through the subsequent default of the lessee (*z*), or if the falling over was attributable to some positive act of the lessee (*a*).

(*s*) (1857), 1 H. & N. 817.
(*t*) *Doe* v. *Wood* (1819), 2 B. & Ald. 724 ; *Muskett* v. *Hill* (1839), 5 Bing. N. C. 694.
(*u*) *Martyn* v. *Williams* (1857), 1 H. & N. 817.
(*x*) *Ibid.*
(*y*) *Todd* v. *Flight* (1860), 30 L. J. (N.S.) C. P. 21.
(*z*) *Cheetham* v. *Hampson* (1791), 4 T. R. 318.
(*a*) *Gandy* v. *Jubber* (1864), 33 L. J. Q. B. 151.

Where there is a filthy drain, and the owner of the land to which the drain belongs leases the land (together with the drain) and the lessee covenants to repair the premises, and to scour, cleanse, and repair the drain,—and an injury happens to an adjoining owner from the drain being left unscoured and uncleansed subsequently to the date of the lease, the landlord will not (but the lessee will) be liable for such injury (*b*) ; but if the drain was already a nuisance at the date of the lease, and the lessor takes no such covenant from the lessee,—and *à fortiori*, if he requires the drain to be continued in its filthy condition,—the lessor will be liable, and also the lessee (*c*).

(*p*.) RELIEF AGAINST FORFEITURE FOR BREACH OF COVENANT.

Relief,—from breach of covenant: (1) Covenant for payment of rent.

Where a lessor is proceeding to effect a forfeiture of a lease, the lessee (or under-lessee) may (under certain circumstances) apply for and obtain relief from the forfeiture. And, Firstly, where the forfeiture is for non-payment of the rent (including the royalty) reserved by the lease.—A court of equity will relieve by virtue of its general equitable jurisdiction (*d*),—within the time (and otherwise upon the terms) in that behalf appointed by the 4 Geo. 2, c. 28, whereby six months after possession obtained under the execution in the lessor's action of ejectment is prescribed as the limit of time for the equitable relief being applied for, and the lessee is required also to pay the rent in arrear and the costs of the ejectment proceedings. But that equitable relief is not obtainable for other breaches of the lessee's covenants (*e*), or even against an ejectment for non-payment of rent, if there are in fact any such other breaches for which the lessor might have ejected (*f*). Also, any court may now give relief against an ejectment for non-payment of rent,—either (1) subject to and according to the provisions contained in the 15 & 16 Vict. c. 76, s. 212, whereby it is provided, that the action is to be stayed on payment into court of the rent in arrear, and on payment of the costs of the action; or (2) under and according to the general equitable jurisdiction in that behalf above referred to. And such relief is also available where the lessor recovers peaceable possession without bringing any action of ejectment (*g*).

(*b*) *Russell* v. *Shenton* (1842), 11 L. J. (N.S.) Q. B. 289.

(*c*) *Rosewell* v. *Prior* (1702), 2 Salk. 460 ; *Todd* v. *Flight* (1860), 30 L. J. (N.S.) C. P. 21.

(*d*) *Bowser* v. *Colby* (1841), 1 Ha. 109.

(*e*) *Hill* v. *Barclay* (1811), 18 Ves. 56.

(*f*) *Wadman* v. *Calcraft* (1803), 10 Ves. 66 ; and *Bowser* v. *Colby*, *supra*.

(*g*) *Howard* v. *Fanshawe*, [1895] 2 Ch. 681.

(2) Covenants other than the covenant for the payment of rent.

And Secondly, where the forfeiture is for the breach of any other covenant than the covenant to pay rent, relief against the forfeiture may be obtained by the lessee (or under-lessee), or by the assign of the lessee (or under-lessee), in any court whether of law or of equity, under and subject to the provisions in that behalf contained in the 44 & 45 Vict. c. 41, s. 14, and the 55 & 56 Vict. c. 13, s. 2,—whereby it is provided, that (in effect) on payment of compensation for the breach (and on payment of the expenses) the relief is to be given on such terms as the court shall think fit; but no relief under these Acts is obtainable after the lessor has actually entered for the forfeiture (*h*),—assuming, of course, that the lessor before ejecting has given the notice in that behalf now required before an ejectment will lie (*i*). Also, no relief under the last mentioned Acts is obtainable, where the breach is of the covenant not to assign or underlet (*k*),—at least, no relief will, in general, be granted in such a case (*l*); or, in general, where the forfeiture is on account of the bankruptcy of the lessee (or under-lessee) or of his assignee; and the relief is in no case obtainable, where the breach of covenant is of the covenant by a mining lessee to permit inspection, etc.

(*q.*) COVENANTS, CONSTRUCTION OF.

Covenants,—dependent and independent.

The question whether certain covenants in a mining lease are mutually dependent or are mutually independent covenants, appears to be wholly a question of construction (*m*).

Covenants,—joint, or joint and several.

Where there are co-lessors,—*e.g.*, tenants in common (legal and equitable) of mines,—and in a lease of the mines, the lessees enter into the usual covenants with all the lessors, the covenants, although expressed to be with the covenantees and with every two and one of them, are joint only,—so far as regards the covenantees; and therefore all the covenantees during their lives, and (after the deaths of any of them) the survivors of the covenantees may sue, and are the only proper parties to sue, on the covenants; and when the interest of the covenantees is joint, the same covenant cannot as regards the covenantees

(*h*) *Rogers* v. *Rice*, [1892] 2 Ch. 170.
(*i*) *North London Land Co.* v. *Jacques* (1883), 32 W. R. 283.
(*k*) *Barrow* v. *Isaacs*, [1891] 1 Q. B. 417.
(*l*) *Imray* v. *Oakshette*, [1897] 2 Q. B. 218.
(*m*) *Wood* v. *Copper Miners' Co.* (1849), 14 C. B. 428; 23 L. J. (N.S.) C. P. 209.

be made joint and several by any words, however strong (*n*); but where the interest of the covenantees is several, it is otherwise (*o*); and, of course, the liability of the covenantors may always be (and usually is) both a joint and a several liability.

(*r*.) EXTRINSIC EVIDENCE,—IN RELATION TO COVENANTS.

Evidence,—to explain local phrases.

It is a general rule of law, that parol evidence is admissible to explain technical expressions in written documents. Thus, *e.g.*, in a mining lease, where the lessee covenanted to get the whole of the mines, "not deeper than or below the *level* of the bottom of the mine," parol evidence was admitted to show that the word "level" had a particular meaning among miners different from the meaning of "horizontal line," and that it had reference to the drainage and the inclination of the strata,—so that every part of the mine which would require to be drained from a point lower than the bottom of the mine was below the *level* of the bottom there, though it might be above the horizontal plane passing through that part of the bottom (*p*). And so also, where in the award of the commissioners for regulating the working of mines in the Forest of Dean, the southern boundary of a colliery was defined "as commencing at the points where the *said level* struck the coal, and extending in an eastward direction *as deep as the said level would drain*,"—and the dip of the coal being to the south, the boundaries were sufficiently complete, provided a certain old level was the level referred to in the definition, it was decided that the old level was the level referred to (*q*).

It rather appears, that a general dictionary is not evidence of the meaning (as derived from local usage) of a mining phrase (*r*); but a glossary of mining terms would be accepted (*s*).

(*n*) *Slingsby's Case* (1587), 5 Rep. 18 b; *Foley* v. *Addenbrooke* (1844), 4 Q. B. 197; *Bradburne* v. *Botfield* (1845), 14 M. & W. 559; 14 L. J. (N.S.) Exch. 330.

(*o*) *Duke of Northumberland* v. *Errington* (1794), 5 T. R. 522; *Mills* v. *Ladbroke* (1844), 13 L. J. (N.S.) C. P. 122; *Sorsbie* v. *Park* (1843), 12 M. & W. 146.

(*p*) *Clayton* v. *Gregson* (1836), 5 Ad. & E. 302; *Smith* v. *Wilson* (1832), 3 Barn. & Ad. 728; *Att.-Gen.* v. *Shore* (1842), 9 Cl. & F. 499, *per* TINDAL, C.J., and PARKE, B.

(*q*) *Brain* v. *Harris* (1855), 24 L. J. (N.S.) Exch. 177; *Morgan* v. *Edwards* (1815), 6 Taunt. 395; *Hutchison* v. *Bowker* (1839), 5 M. & W. 535; *Hutton* v. *Warren* (1836), 1 M. & W. 474; *Wigglesworth* v. *Dallison* (1779), 1 Doug. 201.

(*r*) *Houghton* v. *Gilbart* (1836), 7 C. & P. 701.

(*s*) *Martyn* v. *Williams* (1857), 1 H. & N. 817; 26 L. J. Exch. 117.

Interpretation,—of local phrases, examples of.

(*s.*) INTERPRETATION OF SPECIAL PHRASES IN COVENANTS.

The following are a few further illustrations of phrases more or less technical occuring in mining instruments; and the illustrations will be found to show also the importance of an exact apprehension of the terms used, and the need for accuracy in the use of them. In *Foley* v. *Addenbrooke* (*t*), where (in a lease of iron mines and works) the lessee covenanted to carry on the furnaces and works effectually, except for the time required for repairs, or in case the ironstone to be got or raised by the lessee out of the demised mines would not by itself, or with a proper mixture, make good common pig-iron,—It was held, that it was not necessary that the proper mixture should be found upon the lands demised, but it was to be procured by the lessees in accordance with the actual practice of lessees under similar covenants (*t*). And in the same case, the lessee having also covenanted to yield up in repair the furnaces, fire-engine, iron-works, and buildings, except the ironwork castings, railways, *machines*, and the movable implements and materials,—It was held, that the lessee had a right to remove whatever was in the nature of a machine, or part of a machine, as ironwork or iron casting; and that the lessee was not bound to restore the brickwork in a perfect state, as if the article intended to be covered or protected were there, but was to exercise his right of removal, so as to leave the brickwork in a state conveniently useful to the lessor. And in *Pringle* v. *Taylor* (*u*), where one coal owner agreed to find sufficient coal for the engine of another owner, for drawing water from the coal mines, "*as they then stood*," of both owners; and the other owner sunk to a lower seam, and his engine consumed much more coal for draining purposes,—it was held, that the covenanting owner was no longer bound to furnish any coal, because the measure of the sufficiency had been destroyed (*u*). Also, where the lessee of certain alum mines had the right to take alum from certain coal wastes; and a lease of the coal mines was subsequently granted, in which it was provided, that the grant should not injure the rights of the alum lessee; and it appeared, that if the coal was to be thoroughly worked it would be necessary to remove the pillars that supported the roof, the effect of which would be, that the alum in the coal wastes would be rendered inaccessible,

(*t*) (1844), 13 M. & W. 174; 14 L. J. (N.S.) Exch. 169.

(*u*) (1809), 2 Taunt. 150.

—It was held, that the coal pillars could not be removed (*x*). So also, the word "*homestead*" (*y*) and the word "*garden*" (*z*), —in a definition of the parcels demised, or in an exception of particular mines out of the demise, or in a restriction upon the right of entering upon and using the surface for mining purposes,—have been held to be words of a local character, deriving their true significance from parol or extrinsic evidence.

(iv.) On the specific performance of the contract for a mining lease (or mining license).

EQUITABLE CHARACTER OF THIS REMEDY.

Specific performance,—by the execution of the proper deed.

It is the province of a court of equity to decree the specific performance of agreements or contracts,—whether the agreement be for a lease or for the grant of a license,—not, of course, by enforcing the lessee to work the mines proposed to be demised, or by enforcing the licensee to exercise the liberties proposed to be granted, but by decreeing the execution of a proper indenture of lease or (in the case of the license) of a proper deed of grant,—that being the true nature (and limit) of the relief given by courts of equity in an action for the specific performance of the agreement (*a*) ; and thereafter the rights of the parties under the lease or license will depend on the indenture or deed.

Specific performance,—in a clear case, but not *as of right*.

Where the agreement is established,—and is unambiguous,—the decree for specific performance is almost a matter of course. Still the remedy by specific performance is not a legal right, but is a purely equitable right,—the legal right being only to recover damages for the breach of the agreement ; and therefore the equitable remedy may be refused,—the court leaving the plaintiff to recover damages, and now (since the fusion of law and equity) giving him damages, in lieu of specific performance. In other words, there are numerous grounds of defence to an action for specific performance, which would not be grounds of defence at all to an action for damages for the breach of the agreement ; and without treating of this matter exhaustively (*b*), it will be

(*x*) *Earl of Glasgow* v. *Hurlet and Campsie Alum Co.* (1850), 3 H. L. Cas. 25 ; *Mundy* v. *Duke of Rutland* (1883), 23 Ch. D. 81.

(*y*) *Bowler* v. *Wolley* (1812), 15 East, 444.

(*z*) *Gilbert* v. *Tomison* (1824), 4 Dow. & R. 222.

(*a*) *Wolverhampton Rail. Co.* v. *London and North West Rail. Co.* (1873), L. R. 16 Eq. 433.

(*b*) Fry on Specific Performance, 2nd ed., 1881.

profitable to illustrate it by the decisions regarding mining leases and mining licenses only.

INSTANCES OF REMEDY BEING GRANTED OR REFUSED.

Illustrations of the equitable remedy.

In *Ricketts* v. *Bell* (*c*), where certain coal-lessees had acquired way-leave rights and other surface rights over the lands of A., for a term of years; and A. died during the term; and the coal-lessees negotiated for a renewal of the way-leave and other surface rights; and pending these negotiations the term ended, but the lessees continued in the enjoyment of the way-leave rights upon the terms which (so far as regards the amount of the way-leave rent) had been agreed upon in the negotiations; and subsequently, the representatives of A. claimed specific performance of the agreement arrived at between them and the coal-lessees,—but these latter insisted upon, and A.'s representatives as strenuously objected to, the insertion in the grant of a right in the coal-lessees to determine the grant according to the (alleged universal) custom or usage in the locality of the coal mines,—the court refused specific performance, unless the plaintiffs would consent to the insertion of the right in the lease.

In *Price* v. *Griffith* (*d*), there were two tenants in common of certain lands containing minerals; and one of them agreed to demise the coals, etc., to the plaintiff, expecting to procure the concurrence of the other co-tenant in the demise,—in which expectation he was disappointed; and the court held, that (the defendant never having represented that he had power to lease the entirety) the plaintiff was not entitled to a decree for specific performance limited to the defendant's moiety,—a colliery being a very different subject-matter from land in its ordinary acceptation.

DAMAGES OR COMPENSATION, ULTRA.

Damages (or compensation),—in addition.

In *Nelson* v. *Bridges* (*e*), there had been a decree for the specific performance of an agreement by the defendant (the owner of certain stone quarries) to grant to the plaintiff a license to dig and work the quarries; and subsequently to such decree, the plaintiff discovered that a large quantity of the stone had been wrongfully excavated and taken away by the

(*c*) (1847), 1 De G. & Sm. 335.
(*d*) (1851), 1 De G. M. & G. 80; 21 L. J. (N.S.) Ch. 78.
(*e*) (1839), 2 Beav. 238.

defendant (and one U.) during the suit for specific performance, —which suit had been unreasonably protracted by the conduct of the defendant; and in a supplemental action by the plaintiff against the defendant (and U.), the court said, that the plaintiff was entitled to relief in damages (or by way of compensation) for the defendant's wrongful abstraction of the stone; and the court intimated, that if the wrongful acts had been discovered before the decree for specific performance, the plaintiff would have recovered the damages in his original suit, and in addition to obtaining that decree.

But sometimes damages only;

In *Booth* v. *Pollard* (*f*), where the defendant (the owner of certain stone quarries) agreed to let them to the plaintiffs, who agreed to work them, the defendant agreeing to make certain monthly payments to the plaintiffs in respect of the stone which should be monthly gotten; and the defendant failed to make the agreed payments, whereupon the plaintiffs ceased to work the quarries,—and for breach of their covenant to work the defendant sued them at law for damages, whereupon the plaintiffs sued the defendant in equity for specific performance of the agreement, and (in particular) for an account (and payment) of what was due to them under the agreement in respect of the stone gotten by them,—the court refused all relief to the plaintiffs, saying (in effect) that they must proceed at law,—either by defending the defendant's action, or by commencing an independent action of their own, or by taking both these steps, —for that the case was not at all one for specific performance in equity, nor even a case for an account in equity.

NEITHER DAMAGES NOR SPECIFIC PERFORMANCE.

But where no contract, no damages even.

The alleged agreement of which the specific performance is asked for must be a complete agreement; and where writing is required for its efficacy, all the terms of the agreement must be contained in the writing (or written note or memorandum) which evidences it; and the absence of any essential term will be fatal to the completeness of the contract,—so that (in such a case) no specific performance would be decreed (*g*), and even damages for breach of the alleged agreement would not, in such a case, be recoverable (*h*): But a mere uncertainty in the parcels, which may be removed by parol or extrinsic evidence,

(*f*) (1840), 4 You. & C. Exch. 61.
(*g*) *Maynell* v. *Surtees* (1854), 3 Sm. & G. 101.
(*h*) *Jones* v. *Reynolds* (1836), 3 A. & E. 805.

will not be fatal to the agreement (*i*) ; *secus*, if the uncertainty cannot be so removed (*k*).

COVENANTS WHICH WILL (OR WILL NOT) BE SPECIFICALLY ENFORCED.

Covenants, as to the sinking of pits ; and as to the order of working,—when (and when not) enforced.

The court has refused to specifically enforce such covenants as the following :—A covenant to restore the surface to its original state, *e.g.*, when a gravel pit had been worked (*l*) ; A covenant to work the demised minerals (*m*) ; A covenant to make monthly payments towards the working expenses of a quarry (*n*). But a covenant to sink a pit to get the demised mines, *and not to get same otherwise than by the pit so to be sunk*, would be (in effect) enforceable,—*scil.*, because of the negative portion of the covenant (*o*) ; also, a covenant to work two specific seams of coal concurrently, *and not to work either of them in advance of the other*, would be (in effect) specifically enforceable,—and for the same reason.

LEGAL RELATIONS,—AFTER SPECIFIC PERFORMANCE DECREED.

Specific performance,—legal position before and after.

And generally the court decrees specific performance of agreements only where it can dispose of the matter by an order capable of being enforced at once,—*e.g.*, by the execution of a lease or a conveyance; and the court does not decree the performance of continuous acts,—which, if they are to be provided for at all, must be provided for by covenants in the lease or conveyance, and for breach of which the party may have his legal remedy (*q*). Moreover, the performance of such continuous acts cannot be enforced even indirectly by injunction (*r*).

Although under an agreement to do a thing, a court of equity will commonly regard the thing as done,—*scil.*, in favour of persons claiming for value,—still that is only for certain limited purposes,—and the matter is only regarded as done in equity, and not (for it is not) legally and completely done. Therefore,

(*i*) *Doe* d. *Templeman* v. *Martin* (1833), 4 B. & Ad. 785.
(*k*) *Price* v. *Griffith* (1851), 1 De G. M. & G. 80.
(*l*) *Flint* v. *Brandon* (1803), 8 Ves. 159.
(*m*) *Pollard* v. *Clayton* (1855), 1 K. & J. 462 ; *Lord Abinger* v. *Ashton* (1873), L. R. 17 Eq. 358.
(*n*) *Booth* v. *Pollard* (1840), 4 You. & C. Exch. 61.
(*o*) *Lumley* v. *Wagner* (1852), 1 De G. M. & G. 604.
(*q*) *Hills* v. *Croll* (1845), 2 Phil. 60 ; *Blackett* v. *Bates* (1865), L. R. 1 Ch. App. 117.
(*r*) *Powell Duffryn Coal Co.* v. *Taff Vale Rail. Co.* (1874), L. R. 9 Ch. App. 331.

under an agreement for value by a lessee to assign his lease, although the agreement renders the intended assignee of the lease an equitable assignee thereof,—so that he may call for a complete legal assignment at any time,—still the equitable assignee is not an assignee within the meaning of the covenants contained in the lease; and he does not come into any privity of estate with the lessor, so as to be liable (*e.g.*) on the covenants for the payment of the rents reserved by the lease (*s*) ; and until he is a complete legal assignee, he is not entitled to enforce (*e.g.*) an option of purchase or the like given by the lease (*t*).

DEFENCES TO ACTION FOR SPECIFIC PERFORMANCE.

(1) Breach of trust,—

An agreement for a lease of mines, if it is to be specifically enforced by the grant of a lease, can only be enforced according to the terms of the agreement,—and without any variation in (*e.g.*) the rent agreed to be reserved (*u*) ; and if the lease can only be validly created where it reserves the best rent, and the agreed rent is not (or, *semble*, has come not to be) the best rent, specific performance will not be decreed ; and this is upon the principle that the court will not decree specific performance where that would involve a breach of trust (*u*).

or of prior contract ;

In *Holmes* v. *Powell* (*x*), where the plaintiff was entitled to the benefit of an agreement whereby X. had agreed to sell all the coal under the C. estate, with liberty to work,—and the workings commenced immediately the agreement was entered into, and the purchase money was duly paid, and the possession of the coal had ever since been held according to the title acquired under the agreement, but the actual workings had been intermitted for a time ; and it appeared, that, during the period of such intermission, the persons entitled under X. to the C. estate, had sold that estate to the defendant (expressly including the mines and minerals in the sale); and the defendant, refusing to recognise the prior title of the plaintiff, this action was commenced for specific performance of the agreement,—the court held, that the defendant purchased with notice of the title under the agreement, and that the agreement must be enforced against him,—the possession of the mines by the plaintiff being a patent fact, and carrying with it constructive

(*s*) *Cox* v. *Bishop* (1857), 8 De G. M. & G. 815.
(*t*) *Friary Holroyd Co.* v. *Singleton*, [1899] 1 Ch. 86 ; 2 Ch. 261.
(*u*) *Carne* v. *Mitchell* (1846), 15 L. J. (N.S.) Ch. 287.
(*x*) (1856), 8 De G. M. &. G. 572.

notice of the plaintiff's title under the agreement, and the short intermission of the workings not amounting to an abandonment of the possession, or to any abandonment of the agreement.

where there has been no *laches*.

Where a mining lease is granted by a tenant for life, and it purports to be granted under the leasing powers of the tenant for life, if the remainderman objects to it, he must do so at the earliest available moment,—otherwise he will be barred of his remedy, the defence of *laches* applying with peculiar force to a lease of minerals. And therefore, in *Ernest* v. *Vivian* (*y*), where the lease was granted in 1840, and the lessor died the same year, and the remainderman objected at once to the validity of the lease, and refused to accept the royalty; and he afterwards sold the property to the plaintiff, and the plaintiff in 1860 commenced his action to set aside the lease,—the court dismissed the action on the ground of the delay, saying that the plaintiff (as purchaser) was in no better position than the remainderman himself would have been in, if he (the remainderman) had been the plaintiff.

COMPENSATION, OR RESCISSION,—CASES FOR.

(2) Title,—defect of; compensation,—for possible outstanding mines.

In *Lyddal* v. *Weston* (*z*), an objection taken by a purchaser of lands that, under an old reservation, the tin, lead, and copper mines (and the royal mines generally) were outstanding in the crown, was ridiculed by the court,—it being a mere assumption that there were any such mines, and a further assumption that the crown would even (or had even the right to) enter and work the mines. But (apart from the special circumstances of that case) that decision is not one which can be accepted (*a*),—for at the present day, such an objection, if the facts should support it, would be a fatal objection to the title, every sale of the "*freehold*" implying (unless the contract of sale shall otherwise express) that the sale comprises the mines and minerals as well as the surface (*b*). And accordingly, in *Seaman* v. *Vawdrey* (*c*), where the minerals had been reserved so long ago as 1704,—that is to say, "the springs, veins, and mines of salt,"—and express liberty was given to sink pits and otherwise to work and get the salt,—and that without any liability to pay compensation for the damage to the surface which might be so occasioned,—

Rescission,—for mines clearly outstanding,—

(*y*) (1863), 33 L. J. (N.S.) Ch. 513.
(*z*) (1739), 2 Atk. 19; and see *Anon.* 1803, Sugden's V. & P., 14th ed., 393.
(*a*) *Seaman* v. *Vawdrey* (1809), 16 Ves. 390.
(*b*) *Gray* v. *Briscoe* (1606), Noy. 142.
(*c*) *Supra.*

and upon a sale of the lands, the purchaser took objection to the title on the ground of such old reservation, but was willing to accept compensation in lieu of rescinding the contract,—the court held, that his objection was a valid one, and decreed him compensation for the defect.

In the case of *freeholds.*

On a contract for the sale of lands of freehold tenure, the mines and minerals are included,—being parcel of the soil (*d*); and if there be no title to the mines,—either because the lands, having been formerly copyhold, have been enfranchised with an exception (express or implied) of the mines (*e*), or because the mines have otherwise come to be held as a separate tenement and by a separate title (*f*),—the contract will not be enforced; but the purchaser may rescind it at once, on discovery of the defect of title (*g*),—and he need not wait, in order to give the vendor an opportunity of acquiring the mines (*h*); and in such a case, the purchaser is not even liable for damages for breach of the contract, his rescission being lawful (*i*).

But not in the case of *enfranchised copyholds.*

On the purchase of copyholds, where the contract is silent as to the minerals, it is no objection to the title, that the purchaser will not have the minerals (*k*),—just as, upon the purchase of an under-lease, it is no objection to the title, that the under-lease is liable to be defeated for a breach of the covenants of the (superior) lease,—all these so-called objections being incidental to the property itself, and not to the vendor's title to it (*l*). Also, upon a contract to sell copyholds, and (before completion of the contract) to procure their enfranchisement so as to convey them to the purchaser as freeholds, the fact that the enfranchisement deed reserves (and, unless by special agreement to the contrary, it must reserve) the minerals to the enfranchising lord, is no objection to the title of the vendor; nor is it any breach of the contract on his part (*m*).

Rescission,—by vendor, on ground of expense of proving title to mines.

Where, upon a sale of land (described as of freehold tenure), the vendor believes himself to be entitled to the mines and minerals thereunder, but the proof of his title to the mines would

(*d*) *Townley* v. *Gibson* (1788), 2 T. R. 701.
(*e*) *Mawson* v. *Fletcher* (1870), L. R. 6 Ch. App. 91; *Upperton* v. *Nickolson* (1870), *ibid.* 436; *Bellamy* v. *Debenham*, [1891] 1 Ch. 412.
(*f*) *Smith* v. *Lloyd* (1854), 9 Exch. 574.
(*g*) *Bellamy* v. *Debenham*, *supra.*
(*h*) *Forrer* v. *Nash* (1865), 35 Beav. 167; *In re Head's Trustees and Macdonald* (1890), 45 Ch. D. 310.
(*i*) *Bellamy* v. *Debenham*, *supra.*
(*k*) *Hayford* v. *Criddle* (1855), 22 Beav. 477.
(*l*) *Ibid.*
(*m*) *Kerr* v. *Pawson* (1858), 25 Beav. 394.

be very expensive (and perhaps a little contentious), he may lawfully insert a special condition in the contract of sale giving him the right to rescind in case of any objection to his title being persisted in ; and the purchaser cannot (in such a case) insist upon having the land, with an abatement of the purchase money on account of the mines not being (or not clearly appearing to be) comprised in the purchase deed (*n*) ; and the purchaser may also, in such a case, rescind for want of title to the mines (*o*).

Where a vendor has proceeded to enforce the specific performance of a contract for the sale of freehold lands, and the court has made a decree in his favour, and (as is usual in such a case) (*p*) has referred the matter to chambers for enquiry as to the vendor's title,—if it appear on such enquiry that the vendor has, in fact, no title to the mines, that objection will be fatal to his claim, and the action will be dismissed,—and usually with costs ; although if the want of title to the mines was all along apparent, on the face of the abstract itself as originally delivered, the action would be dismissed without costs (*q*).

SPECIFIC PERFORMANCE AFTER TERM EXPIRED.

Jurisdiction,—exists;

The court will occasionally decree the specific performance of an agreement for a lease, even after the term agreed for has expired,—but it does so very rarely, and only under very special circumstances (*r*).

and although not to be exercised in trivial cases,

In *Nesbitt* v. *Myer* (*s*), the plaintiff asked for specific performance only for the purpose of commencing an action or actions at law against the defendant for trumpery damages recoverable as for breach of the covenants on the defendant's part which would have been inserted in the lease if a lease had been granted,—and the court (in mercy to the plaintiff) refused her claim, but without costs ; and in a case of *Western* v. *Perrin*, otherwise *Weston* v. *Pimm* (*t*), the court again dismissed the claim, but without costs, and on (substantially) the like ground.

will be exercised in a serious and proper case.

In *Onions* v. *Cohen* (*u*),—an action in which the plaintiff claimed specific performance of an agreement for a lease of

(*n*) *Mawson* v. *Fletcher* (1870), L. R. 6 Ch. App. 81.
(*o*) *Upperton* v. *Nickolson* (1870), L. R. 6 Ch. App. 436.
(*p*) *Curling* v. *Austin* (1862), 2 Dr. & Sm. 129.
(*q*) *Upperton* v. *Nickolson* (1870), L. R. 6 Ch. App. 436.
(*r*) *Nesbitt* v. *Myer* (1818), 1 Sw. 223 ; *Walters* v. *Northern Coal Mining Co.* (1855), 25 L. J. (N.S.) Ch. 633.
(*s*) *Supra.*
(*t*) (1814), 1 Sw. 225, n. (a).
(*u*) (1865), 2 H. & M. 354.

certain blast furnaces,—it appeared that the agreement was for seven years, the plaintiff as lessee to covenant to repair, and the defendant as lessor to covenant for quiet enjoyment; and before any lease had been granted pursuant to the agreement but after the plaintiff had taken possession, the plaintiff discovered that the mines within and under the soil of the site of the blast furnaces and within and under the adjoining lands were not in his lessor, but were in third parties who were working the mines, and (as the plaintiff alleged) subsiding the demised premises; and the court decreed specific performance according to the agreement,—that is to say, with an absolute covenant for quiet enjoyment, saying,—that the plaintiff was entitled to be put in a position enabling him to sue the defendant at law for breach (if there should have been a breach) of the quiet enjoyment which he was entitled to under the agreement; and the court (even if the term of seven years had expired before the decree) would have been disposed (and able) in such a case to have directed the lease to be executed (*x*).

EQUITABLE CONSIDERATIONS GENERALLY.

(3) Want of common fairness.

In *Wood* v. *Londonderry* (*Marquis*) (*y*), where the owner of certain surface lands granted (or agreed to grant) a way-leave over his lands for a term of sixty-three years at a yearly rent of 400*l.*; and subsequently he (or his representatives) sold the land (subject to the way-leave but without the benefit of the way-leave rent) to A. and sold the way-leave rent to B.,—the original grant being subject to be determined (by the grantee only) at any time on notice; and afterwards A. (on purpose to determine B.'s further receipt of the way-leave rent) granted (or agreed to grant) a new right of way-leave at a new (and larger) way-leave rent payable only to himself, and undertook to indemnify the grantee against all claims in respect of the old way-leave rent,—the court held, that B. was entitled, during the residue of the sixty-three years or until the grantee should sooner determine the way-leave, to so much of the new way-leave rent as was equivalent to the old way-leave rent, it being contrary to equity that A. should purposely defeat B. of the benefit of his purchase, he (A.) having paid less for his own purchase precisely on account of the 400*l.* way-leave being sold to B.

(*x*) *Mundy* v. *Jolliffe* (1839), 5 My. & C. 167; *Pain* v. *Coombs* (1857), 3 Sm. & G. 449.

(*y*) (1847), 10 Beav. 465.

Where there were two contemporaneous demises by one and the same lessor, of two adjoining mineral areas, the one demise to A. and the other demise to B.,—and the line of division between the two areas was a certain fault supposed to about equally divide the aggregate of the two areas ; and it was afterwards found that the position of the fault was such as to (in effect) give B. the whole aggregate area save a few acres,—the court held, that B. could not enforce specific performance as against his lessor, or claim to deprive A. of the area intended to have been demised to him (*z*).

(4) Damages the proper remedy.

A covenant entered into by a lessor to the effect that he will, at or immediately before the commencement of the demise, fill up a gravel pit (parcel of the land demised),—and generally level or restore the surface,—is not a covenant which the court will specifically enforce,—*scil.*, because the whole matter is pecuniary, and the lessee can have damages, and therewith do the work himself (*a*) ; and the damages may lawfully include not only the cost of doing the work, but also the interim damage to the plaintiff from the work not having been done at the time specified,—so that the damages in such a case are even better than the specific performance of the covenant would be (*b*).

Where the plaintiffs covenanted to work a stone quarry of the defendant's, and the defendant covenanted to pay the plaintiffs so much money monthly in respect of their workings ; and the defendant fell in arrear with his payments,—whereupon the plaintiffs ceased to further work ; and the defendant sued them at law for damages for breach of the covenant to work,—the court said, the plaintiffs' course was to defend the action at law (*c*),—that is to say, not to rush into equity for an order on the defendant to pay up the arrears and to continue the future monthly payments.

MISREPRESENTATIONS AND MISUNDERSTANDINGS.

(5) Misrepresentation,—

In *Higgins* v. *Samels* (*d*), the plaintiff was the owner of a field containing a bed of limestone (unopened), and he incautiously represented to the defendant that the lime to be got

(*z*) *Davis* v. *Shepherd* (1866), L. R. 1 Ch. App. 410 ; and see *Whittemore* v. *Whittemore* (1869), L. R. 8 Eq. 603.

(*a*) *Flint* v. *Brandon* (1803), 8 Ves. 159.

(*b*) *Ibid.*

(*c*) *Booth* v. *Pollard* (1840), 4 You. & C. Exch. 61.

(*d*) (1862), 2 J. & H. 460.

was "*fit for the London market*,"—that is to say, that it was of the best quality ; and the defendant was induced thereby (or in part induced thereby) to sign a contract for a lease of the limestone ; and after trying it, he discovered that the lime was not in fact of the quality represented ; and he refused to accept a lease pursuant to the contract,—whereupon the plaintiff sued to enforce specific performance, alleging that the defendant had relied on his own inspection of the limestone ; but the court said, the plaintiff's representation was of a definite character, and amounted almost to a warranty,—and the defendant's subsequent (superficial) inspection did not get rid of that definite representation ; and specific performance was therefore refused.

although innocent ;

In *Powell* v. *Elliot* (*e*), where the plaintiff was the owner of certain collieries and coal works, and agreed to sell same to the defendant at a specified price,—which price was arrived at between the parties upon a representation of the net yearly profits made after deducting (among other expenses) the cost of "*the stores*" consumed in the working ; and the defendant took possession, and expended large sums in the further working of the collieries, but found the cost of "*the stores*" was greater than as had been represented by the plaintiff,—whereupon the plaintiff sued for specific performance of the contract at the agreed price, and the defendant counterclaimed for rescission, and also claimed an abatement of the price on the ground of the misrepresentation as to the cost of the stores consumed in the working :—The court found that there had been the misrepresentation, and decreed specific performance of the contract, but with an abatement of the purchase money.

and *à fortiori*, if fraudulent ;

In *Ricketts* v. *Bell* (*f*), the defendant was the lessee of a way-leave for his coal mines, the lease having been granted by a predecessor in title of the plaintiff ; and in the lease, there was a clause enabling the lessee to determine the lease at any time on giving one year's notice; and when the lease was about to expire, the defendant negotiated with the plaintiff a renewal of the lease for fourteen years at an increased rent,—the contract for the renewal saying nothing as to the lessee's power to determine the new lease ; and the defendant subsequently used the way-leave under the renewal agreement, and then gave a year's notice to determine it,—which notice the plaintiff said

and although misrepresentation implied only.

(*e*) (1875), L. R. 10 Ch. App. 424. (*f*) (1847), 1 De G. & Sm. 335.

was not justified by the agreement; and in an action by the plaintiff for specific performance of the contract, the court said, that the defendant might reasonably assume that there was to be the old (and usual) power to determine, and dismissed the plaintiff's action with costs.

VAGUE COMMENDATIONS, AND GLOWING DESCRIPTIONS.

Mere puffs,—not misrepresentations.

A mere vague commendation is not a misrepresentation, either as regards mines or any other undertaking (*g*) ; and it is necessary that the misrepresentation should be of some specific fact,—as (*e.g.*) that a particular quality of lime could be produced from the stone to be gotten out of an unopened quarry (*h*).

And, of course also, when a man has not relied on the representation,—or ought not, in reason, to have relied on it,—but has exercised,—or ought, in reason, to have exercised—his own observation and judgment, he has no remedy in case the representation is false (*i*).

Mere glowing descriptions,—not misrepresentations.

Glowing descriptions of the probable success of a mining adventure are not a fraud, entitling a shareholder in the mining company to rescind his contract and to recover back the money paid for his shares (*k*),—*scil.*, in the absence of *mala fides* on the part of the vendor of the shares ; but it would, *semble*, be *mala fides* on the part of the vendor, if after he had thoroughly proved that the mine was unworkable to a profit, he got up a sort of bubble company, merely to sell the shares on the faith of the glowing descriptions of the mines (*l*).

No misrepresentation,—if party relied on his own opportunities for inspection.

In *Small* v. *Attwood* (*m*), the plaintiffs (purchasers of certain freehold and leasehold lands, mines, and ironworks) sued for rescission of their contract upon the ground of misrepresentation by the defendant, the principal misrepresentation alleged being as regards the cost of production of the iron at the ironworks ; but it appeared, that the plaintiffs had repeatedly inspected the purchased premises before signing the contract, and had also inspected their vendor's books showing the profits made by him out of the same premises before the sale thereof to the plaintiffs, —and the court dismissed the action for rescission, upon the

(*g*) *Jennings* v. *Broughton* (1853), 5 De G. M. & G. 126.
(*h*) *Higgins* v. *Samels* (1862), 2 J. & H. 460.
(*i*) *Jennings* v. *Broughton* (1853), 5 De M & G. 126.
(*k*) *Jennings* v. *Broughton* (1853), 17 Beav. 234.
(*l*) *Ibid.*
(*m*) (1837), 6 Cl. & F. 232 (*sub nom. Attwood* v. *Small*).

ground that the alleged misrepresentation was not made out; and the plaintiffs' own inspection beforehand rendered the allegation itself somewhat suspicious; possibly the defendant had made a good bargain, but that was not a fraud on his part; and the plaintiffs had, in fact, relied on their own inspection and judgment.

Or otherwise, if he was not influenced by the misrepresentation.

Where there is a contract for the sale of a freehold estate, and the conditions of sale expressly represent that there is a fine vein of (anthracite) coal in the estate,—and it turns out, that the vein has been partly worked out, or is otherwise poor,—the purchaser may or may not be entitled on that ground to rescind the contract or to claim an abatement of his purchase money; but the purchaser will not be entitled either to rescission or to abatement, if the representation did not mislead him (he knowing all about the vein), or if the representation did not materially influence him (*n*).

EQUITABLE RELIEF,—WHEN IN DAMAGES ONLY.

On rescission for misrepresentation,—deposit recoverable back, with a lien therefor until repaid.

Where B. purchased a colliery and ironworks from A. for 20,000*l.*, and re-sold to C. for 25,000*l.*; and subsequently C. objected to complete, and claimed to rescind, on account of a very considerable deficiency of acreage; and thereupon B. required A. to rescind, and to repay to B. the deposit paid; and A. did so; and subsequently C. sued B. for rescission and for the return of the deposit paid by C. to B., and B. defended the action,—the court held (1) that B. having rescinded with A. was unable to complete with C., and was therefore liable to repay the deposit; and (2) that C. was entitled to a lien on the deposit (remaining *in specie*) repaid by A. to B. by way of security for the repayment of the deposit claimed to be recovered from B. (*o*), this decision (as regards the declaration of lien) merely following *Wythes* v. *Lee* (*p*) and *Rose* v. *Watson* (*q*); and these cases were again followed in *Levy* v. *Stogdon* (*r*).

On an inequitable repudiation by lessor,—when damages only recoverable.

In *Fothergill* v. *Rowland* (*s*), the plaintiff had supplied the defendant with 1,000*l.* for the purpose of extending his colliery, and the colliery had been extended accordingly; and it was a term of the agreement under which the 1,000*l.* had been

(*n*) *Colby* v. *Gadsden* (1865), 34 Beav. 416.
(*o*) *Aberaman Iron Works* v. *Wickens* (1868), L. R. 4 Ch. App. 101.
(*p*) (1855), 3 Drew. 396.
(*q*) (1864), 10 H. L. Cas. 672.
(*r*) [1898] 1 Ch. 478.
(*s*) (1873), L. R. 17 Eq. 132.

provided, that the defendant should sell (at a specified price per ton) all the coal gotten out of the colliery; *but the agreement did not specifically provide that the defendant should not sell the coal to any one else*; and coal having subsequently risen greatly in price, the defendant refused to continue supplying the plaintiff at the agreed price,—and under these circumstances, the court said, that the contract for the coal was a contract for the sale of an ordinary chattel, and that the plaintiff's remedy for defendant's breach of the contract was an action for damages merely, and not by way of specific performance or for an injunction. And the like decision was given in the somewhat similar case of *Pollard* v. *Clayton* (*t*), where the vicinity of the defendant's coalfield to the plaintiff's ironworks was specially relied upon as a ground for specifically enforcing the contract or for restraining its breach; but the court said, that that circumstance would be taken into consideration in the assessment of the damages recoverable.

SURPRISE, MISTAKE, AND DISHONESTY GENERALLY.

(6) Surprise, —amounting to fraud.

In *Walters* v. *Morgan* (*u*), where the plaintiff sued for the specific performance of an agreement to grant a lease of the stone and clay on defendant's land, paying 3*d.* for the ton of stone and 4*d.* for the ton of clay; and it appeared, that the plaintiff knew all about the estate, and had hurried the defendant into signing the agreement (the defendant having only then recently purchased the estate),—the court refused to decree specific performance of the agreement, considering that the defendant had been "surprised" into signing it, and suspecting that the royalties were (as the defendant alleged) grossly inadequate.

(6*a*) Mistake, —arising from inadvertence.

Where a man, expecting to obtain the lease of a colliery from A., agrees with B. for a way-leave or right of way for the coals to be gotten out of the colliery, and afterwards he fails to obtain a lease of the colliery,—so that the way-leave is not required,—he is liable in damages for breach of his agreement to accept a lease of the way-leave; but the court will not specifically enforce the agreement (*x*): and note, that, in such a case, the agreement ought to have been expressed to be conditional on the lease of the colliery being obtained.

(*t*) (1855), 1 K. & J. 462.
(*u*) (1861), 3 De G. F. & J. 718.
(*x*) ——— v. *White* (1709), 3 Sw. 108, n.

Where there would formerly have been an action by vendor for specific performance of a written agreement according to the terms of the writing, and a cross-action by the purchaser for specific performance of the agreement with a parol correction of the writing, there would now be simply an action and a counterclaim; but just as formerly both the action and the cross-action would have been dismissed with costs (*y*), so now both the action and the counterclaim would be dismissed with costs (*z*),—although, *semble*, where the case is a proper one for that relief, the court may reform the contract and enforce the contract as reformed, and may do so in one and the same action (*a*).

Mistake,—in reduction of agreement into writing,—effect of.

Where a purchaser knowing (from the abstract of title) that the vendor cannot make an absolutely good title to the property sold, there being some defect for which compensation (by way of abatement from the purchase money) might be (and probably would be) made, if insisted on, takes unqualified possession under his contract,—his doing so amounts to a waiver of his right to compensation (*b*),—*scil.*, because, after possession taken in that manner, *all that remains to be done is to accept a conveyance of the property, and to pay the (full) purchase money* (*c*); and the defect is, in fact, often of a purely technical character, and which would not have varied in any respect the value of the property to the purchaser (*d*); and it is, in general, a mere afterthought in such cases, putting forward the claim for compensation (or abatement).

(6*b*) Dishonesty generally,—in insisting *e.g.* on an abatement of the purchase money.

Where A., B., and C. were partners in a mine; and upon an execution (issued upon a judgment recovered against C. for C.'s private debt), C.'s share in the mine was sold by the sheriff to A. and B., at a very low price (500*l.*),—A. and B. having contrived to damage the sale, by (in effect) representing the prospects of the mine as very poor,—which representation was untrue,—the court, in favour of C., set aside the sale, upon the terms of C.'s repaying the 500*l.* (*e*).

Wilful depreciation of selling price,—effect of.

(*y*) *Townshend* v. *Stangroom* (1801), 6 Ves. 328; *Smithson* v. *Powell* (1852), 20 L. T. 105.
(*z*) *Smith* v. *Wheatcroft* (1878), 9 Ch. D. 223.
(*a*) *Olley* v. *Fisher* (1887), 34 Ch. D. 367; *Martyn* v. *Pycroft* (1852), 2 De G. M. & G. 785.
(*b*) *Burnell* v. *Brown* (1820), 1 J. & W. 108; *Smithson* v. *Powell* (1852), 20 L. T. 105.
(*c*) *Burnell* v. *Brown*, *supra*.
(*d*) *Smithson* v. *Powell*, *supra*.
(*e*) *Johnson* v. *Perens* (1857), 3 Sm. & G. 419.

DELAY,—VARIOUS EFFECTS OF.

(7) Delay.

Equally as in the case of agreements for the sale of mines, so also in the case of agreements for a lease or letting of mines, the plaintiff, if he would obtain specific performance of the agreement, must come promptly. And accordingly, in *Eads* v. *Williams* (*f*), where the plaintiff (owner of a colliery) agreed to let it to the defendant at a rent to be settled by the award of two arbitrators; and the defendant took possession and began working the coal; and subsequently the award was made, but the defendant objected to its validity, and refused to accept the lease at the rent settled by the purported award; but he continued working the coal for about six months afterwards, and then ceased doing so, and abandoned the possession; and the plaintiff (who did not at the time very strongly insist upon the validity of the award) waited for three and a half years after the defendant had ceased to work before commencing his action for specific performance of the agreement,—the court said, that the three and a half years' delay was fatal to that relief; and the plaintiff was only entitled to an account of the coal worked by the defendant.

Lessor may have account only of coal gotten,—but no specific performance.

Lessee may, on due notice, rescind,—

In *Macbryde* v. *Weekes* (*g*), where there was a contract for the grant of a lease of a colliery; and there was considerable delay on the part of the lessor, and the lessee gave him notice to complete within one calendar month from the date of the notice; and the lessor not having completed within the month, the lessee rescinded the contract (that is to say, purported to rescind it); and the lessor (denying that the contract was rescinded) sued for specific performance of the contract,—the court said, that the contract had been rescinded, the very nature of the property (a colliery in work) making time of the essence of the contract; and the circumstance that no time for the completion was specified in the contract itself did not disentitle the lessee to give the notice to complete within the month; and the lessor could not excuse himself (as he attempted to do) upon the ground that other necessary parties had to be conciliated, and their interests purchased up,—*scil.*, because all that should have been done before the contract was entered into (*h*).

doing so, promptly.

The remedy of *rescission*, where the agreement has been completed by the grant of the lease itself, is less generally

(*f*) (1854), 24 L. J. (N.S.) Ch. 531.
(*g*) (1856), 22 Beav. 533.
(*h*) *Gee* v. *Pearse* (1848), 2 De G. & Sm. 325.

available,—for it is essential to that relief, that the *status quo ante* should be restored,—or substantially restored : and that is always difficult ; and even a short delay, on the part of the lessee, will be fatal to the remedy (*i*).

SECTION III.—*On the Stamp Duties on Sales and Leases of Mines,—and on the Registration of the Title to Mines.*

(i.) Stamp Acts, provisions of and decisions on.

(*a.*) GENERAL PROVISIONS OF.

Stamp Act, 1891,—provisions of.

As regards the stamp duties on conveyances (including leases) of mines,—it is provided by the Stamp Act, 1891 (*k*), re-enacting the like provisions contained in the repealed Stamp Act, 1870 (*l*), as follows, that is to say :—

Separate stamps,—for separate operative parts ; and in respect of separate considerations.

Every stamp is to be on the face of the instrument ; and if more than one instrument be written upon the same piece of material, every one of such instruments is to be separately and distinctly stamped with the duty with which it is chargeable (s. 3) ; and except where express provision to the contrary is made by the Act, (1) An instrument containing or relating to several distinct matters is to be separately and distinctly charged, as if it were a separate instrument, with duty in respect of each of such matters (*m*) ; and (2) An instrument made for any consideration in respect whereof it is chargeable with *ad valorem* duty, and also for any further or other valuable consideration or considerations, is to be separately and distinctly charged, as if it were a separate instrument, with duty in respect of each of the considerations (s. 4) (*n*) ; and for the purpose of ascertaining the proper duty or amount of duty, all the facts and circumstances affecting the liability of any instrument to duty, or the amount of the duty with which an instrument is chargeable, are to be fully and truly set forth in the instrument (s. 5) (*o*).

(*i*) *Ernest* v. *Vivian* (1863), 33 L. J. (N.S.) Ch. 513.
(*k*) 54 & 55 Vict. c. 39.
(*l*) 33 & 34 Vict. c. 97.
(*m*) *Hadgett* v. *Inland Revenue Commissioners* (1877), 3 Ex. D. 46.
(*n*) *Clayton* v. *Burtenshaw* (1826), 5 B. & C. 41.
(*o*) *Ulverstone Rural Council* v. *Commissioners* (1864), 2 H. & C. 855.

Unstamped (and insufficiently stamped) documents, —may be stamped after execution,— (1) at any time,—on terms;

By s. 15, except where express provision to the contrary is made by the Act, any unstamped or insufficiently stamped instrument may be stamped after the execution thereof, on payment of the unpaid duty, and a penalty of ten pounds, and also by way of further penalty (where the unpaid duty exceeds ten pounds) of interest on such duty, at the rate of five pounds per centum per annum, from the day upon which the instrument was first executed up to the time when such interest is equal in amount to the unpaid duty. And by s. 14, upon the production of an instrument chargeable with any duty as evidence in any court of civil judicature in any part of the United Kingdom, or before any arbitrator or referee, notice is to be taken of the omission or insufficiency of the stamp thereon; and if the instrument is one which may legally be stamped after the execution thereof, it may, on payment of the amount of the unpaid duty, and the penalty payable by law on stamping the same as aforesaid, and of a further sum of one pound, be received in evidence, saving all just exceptions on other grounds.

and (2) within thirty days,—as of course.

And as regards (among other instruments) conveyances on sale, leases or tacks, bonds, and mortgages, they are to be stamped within thirty days of their execution,—or (when executed abroad) within thirty days of their receipt in the United Kingdom (s. 15 (2)); but where the duty has been assessed by the commissioners, then they are to be stamped within fourteen days after notice of the assessment (s. 15 (2)); and, in either case, there is a fine of ten pounds for non-compliance with these provisions, which fine is to be paid by the vendee, lessee, mortgagee, or obligee; and in every such case, and upon stamping the instrument, there is to be paid (1) the usual penalty on stamping, and also (2) a further penalty equal to the stamp duty (s. 15 (2)): but the commissioners may remit or mitigate the penalty (s. 15 (3)), and may do so at any time (*p*).

(*b.*) SALES,—SPECIFIC PROVISIONS FOR.

Sales,— stamps on,—

And as regards *Conveyances on Sale* (which the Act (by s. 54) defines as including every instrument and every decree or order of any court, or of any commissioners whereby any property,— or any estate or interest in any property,—upon the sale thereof is transferred to or vested in a purchaser, or in any other

(*p*) 58 Vict. c. 16, s. 15.

person on his behalf or by his direction), the Act provides specifically as follows :—

By s. 55, that where the consideration, or any part of the consideration, consists of any stock or marketable security, the conveyance shall be charged with *ad valorem* duty in respect of the value of such stock or security ; and where and so far as the consideration consists of any security not marketable, the conveyance shall be charged with *ad valorem* duty in respect of the amount due on the day of the date thereof for principal and interest upon such security.

(1) where stock the consideration,

By s. 56, that where the consideration, or any part of the consideration, consists of money payable periodically for a definite period, so that the total amount to be paid can be previously ascertained, the conveyance shall be charged in respect of such consideration with *ad valorem* duty on such total amount ; and when and so far as the consideration consists of money payable periodically for a definite period exceeding twenty years or in perpetuity, or for any indefinite period not terminable with life, the conveyance shall be charged in respect of such consideration with *ad valorem* duty on the total amount which will or may, according to the terms of sale, be payable during the period of twenty years next after the day of the date of such instrument ; and when and so far as the consideration consists of money payable periodically during any life or lives, the conveyance shall be charged in respect of such consideration with *ad valorem* duty on the amount which will or may, according to the terms of sale, be payable during the period of twelve years next after the day of the date of such instrument,—no further duty being in any case payable in respect of any provision for securing such periodical payments contained in the deed itself, and only a 10*s.* deed stamp being payable where that provision is contained in a separate deed.

(2) where periodical payments the consideration.

By s. 58, that when any property has been contracted to be sold for one consideration for the whole, and is conveyed to the purchaser in separate parts or parcels by different instruments, the consideration shall be apportioned in such manner as the parties think fit,—so that a distinct consideration for each separate part or parcel is set forth in the conveyance relating thereto ; and the conveyance is to be charged with *ad valorem* duty in respect of each distinct consideration. And where property contracted to be purchased for one consideration for the whole by two or more persons jointly or by any person for

Distinct conveyances,—in completion of one contract of sale :

(1) In general case ;

himself and others, or wholly for others, is conveyed in parts or parcels by separate instruments to the persons by or for whom the same was purchased for distinct parts of the consideration, the conveyance of each separate part or parcel shall be charged with *ad valorem* duty in respect of the distinct part of the consideration therein specified. And where there are several instruments of conveyance for completing the purchaser's title to property sold, the principal instrument of conveyance only is to be charged with *ad valorem* duty, and the other instruments are to be respectively charged with such other duty as they may be liable to, such last-mentioned duty not exceeding in any case the *ad valorem* duty payable in respect of the principal instrument. And where a person having contracted for the purchase of any property but not having obtained a conveyance thereof contracts to sell the same to any other person, and the property is in consequence conveyed immediately to the sub-purchaser, the conveyance is to be charged with *ad valorem* duty in respect of the consideration moving from the sub-purchaser ; and where a person having contracted for the purchase of any property, but not having obtained a conveyance, contracts to sell the whole or any part or parts thereof, to any other person or persons, and the property is in consequence conveyed by the original seller to different persons in parts or parcels, the conveyance of each part or parcel is to be charged with *ad valorem* duty in respect only of the consideration moving from the sub-purchaser thereof, without regard to the amount or value of the original consideration ; and where a sub-purchaser takes an actual conveyance of the interest of the person immediately selling to him, which is chargeable with *ad valorem* duty in respect of the consideration moving from him, and is duly stamped accordingly, any conveyance to be afterwards made to him of the same property by the original seller shall be chargeable only with such other duty as it may be liable to, but the last-mentioned duty shall not exceed the *ad valorem* duty.

(2) where an intermediate sub-sale.

Full *ad valorem* stamp on the contract itself,—when and when not required.

Also, by s. 59, it is enacted to the effect following, that is to say :—(1) That any contract for the sale of any *equitable* estate or interest in any property whatsoever [or for the sale of any estate or interest in any property except lands tenements or hereditaments, etc.] shall be charged with the same *ad valorem* duty, to be paid by the purchaser, as if it were an actual conveyance on sale of the estate, interest, or property

contracted or agreed to be sold (*q*); and (2) That where the purchaser has paid the said *ad valorem* duty and before having obtained his conveyance enters into a contract for the sale of the same, the contract shall be charged, if the consideration for that sale is in *excess* of the consideration for the original sale, with the *ad valorem* duty payable in respect of such excess consideration only, and in any other case with the fixed duty of 10*s.* or of 6*d.* only; and (3) That where duty has been paid in conformity with the foregoing provisions, the conveyance to the purchaser or sub-purchaser or any other person on his behalf or by his direction shall not be chargeable with any duty, the commissioners upon application denoting the payment of the *ad valorem* duty upon the conveyance, or otherwise indicating its payment. However, the ordinary agreement stamp of 10*s.* or 6*d.* is in all cases sufficient for the mere purpose of proceedings to enforce specific performance of (or to recover damages for the breach of) the contract; and where the contract is stamped merely with the 10*s.* or 6*d.* stamp, and the conveyance in execution of the contract is afterwards presented to the commissioners for stamping with the *ad valorem* duty chargeable thereon within the period of six months after the first execution of the contract, the conveyance may lawfully be stamped with that duty; and conversely, where the *ad valorem* duty has been paid in the first instance upon the contract and the contract subsequently goes off, that duty is to be returned. But all these being general provisions, they do not (nor do any of them) affect the specific provisions (as to the stamps upon specific documents) which are contained in any specific statutes (*r*).

Vesting Acts, —like vesting orders, as regards stamps.

Also, when, after May 30th, 1895, any property is by virtue of any Act of Parliament (whether passed before or after that date) vested in any person as upon a sale,—or any person is by virtue of any such Act authorised to purchase any property, —then, within three months from the date of the vesting of the property or (as the case may be) from the completion of the purchase, the *ad valorem* duty must be paid; and the Act or (as the case may be) the conveyance duly stamped therewith is to be produced to the commissioners; failing which, interest at five per cent. per annum becomes chargeable (*s*).

(*q*) *West London Syndicate* v. *Inland Revenue Commissioners*, [1898] 2 Q. B. 507.

(*r*) *R.* v. *Companies' Registrar* (1888), 21 Q. B. D. 131.

(*s*) 58 Vict. c. 16, s. 12.

CHAP. XI.

STAMP DUTIES AND REGISTRATION.

Scale of *ad valorem* duties.

The *ad valorem* duties chargeable are to be ascertained as follows :—

Where the amount or value of the consideration for	£	*s.*	d.
the sale does not exceed 5*l.* - - - - -	0	0	6
Exceeds 5*l.* and does not exceed 10*l.* - - - -	0	1	0
,, 10 ,, 15 - - - -	0	1	6
,, 15 ,, 20 - - - -	0	2	0
,, 20 ,, 25 - - - -	0	2	6
,, 25 ,, 50 - - - -	0	5	0
,, 50 ,, 75 - - - -	0	7	6
,, 75 ,, 100 - - - -	0	10	0
,, 100 ,, 125 - - - -	0	12	6
,, 125 ,, 150 - - - -	0	15	0
,, 150 ,, 175 - - - -	0	17	6
,, 175 ,, 200 - - - -	1	0	0
,, 200 ,, 225 - - - -	1	2	6
,, 225 ,, 250 - - - -	1	5	0
,, 250 ,, 275 - - - -	1	7	6
,, 275 ,, 300 - - - -	1	10	0
,, 300			
For every 50*l.* and also for any fractional part of 50*l.*, of such amount or value - - - - - -	0	5	0

(*c.*) LEASES AND LICENSES,—SPECIFIC PROVISIONS FOR.

And as regards Leases and Licenses, the Act provides specifically as follows :—

Agreement for lease,—stamp on.

By s. 75, that an agreement for a lease or tack, or with respect to the letting of any lands, tenements, or heritable subjects, for any term not exceeding thirty-five years or for any indefinite term, shall be charged with the same duty as if it were an actual lease or tack made for the term and consideration mentioned in the agreement,—the lease or tack itself made subsequently to, and in execution of, the agreement being charged with the duty of sixpence only.

Rent, value of,—ascertainment of, for purposes of the stamp duty.

By s. 76, that where the consideration, or any part of the consideration, for which a lease or tack is granted or agreed to be granted, consists of any produce or other goods, the value of such produce or goods is to be deemed a consideration in respect of which the lease or tack or agreement is chargeable with *ad valorem* duty ; and where it is stipulated that the value of such produce or goods is to amount at least to, or is not to exceed, a given sum, or where the lessee is specially charged with, or has the option of paying after, any permanent rate of conversion, the value of such produce or goods is, for the purpose of assessing the *ad valorem* duty, to be estimated at

such given sum, or according to such permanent rate ; and where a lease or tack or agreement, made either wholly or partially for any such consideration, contains a statement of the value of such consideration, and is stamped in accordance with the statement, it is, so far as regards the subject-matter of such statement, to be deemed duly stamped, unless or until it is otherwise shown that the statement is incorrect.

Penal provisions,—no further duty in respect of.

By s. 77, that a lease or tack, or agreement for a lease or tack, or with respect to any letting, is not to be charged with any duty in respect of any penal rent, or increased rent in the nature of a penal rent, thereby reserved or agreed to be reserved or made payable, or by reason of being made in consideration of the surrender or abandonment of any existing lease, tack, or agreement of or relating to the same subject-matter ; and that no lease made for any consideration in respect whereof it is chargeable with *ad valorem* duty, and in further consideration either of a covenant by the lessee to make, or of his having previously made, any substantial improvement of or addition to the property demised to him, or of any covenant relating to the matter of the lease, shall be charged with any duty in respect of such further consideration. But no lease for a life or lives not exceeding three, or for a term of years determinable with a life or lives not exceeding three, or for a term absolute not exceeding twenty-one years, granted by any ecclesiastical corporation aggregate or sole, is to be charged with any higher duty than 36*s.* ; also, no lease for a definite term exceeding thirty-five years, granted under the Trinity College (Dublin) Leasing and Perpetuity Act, 1851, is to be charged with any higher duty than would have been chargeable thereon if it had been a lease for a definite term not exceeding thirty-five years.

Scale of *ad valorem* duties.

The duties chargeable are to be ascertained as follows :—

	£	*s.*	*d.*
(1.) For any definite term not exceeding a year : Of any dwelling-house or part of a dwelling-house at a rent not exceeding the rate of 10*l.* per annum - - - - - - - - -	0	0	1
(1a.) For any definite term less than a year :			
(a.) Of any furnished dwelling-house or apartments where the rent for such term exceeds 25*l.* - - - - - - - -	0	2	6
(b.) Of any lands, tenements, or heritable subjects except or otherwise than as aforesaid - - The same duty as a lease for a year at the rent reserved for the definite term.			

(2.) For any other definite term or for any indefinite term :

Of any lands, tenements, or heritable subjects,—where the consideration, or any part of the consideration, moving either to the lessor or to any other person, consists of any money, stock, or security :—

In respect of such consideration - - - - { The same duty as a conveyance on a sale for the same consideration.

Where the consideration, or any part of the consideration, is any rent :

In respect of such consideration—if the rent, whether reserved as a yearly rent or otherwise, is at a rate or average rate—

	If the term is definite, and does not exceed 35 years, or is indefinite.	If the term being definite exceeds 35 years, but does not exceed 100 years.	If the term being definite exceeds 100 years.
	£ *s.* *d.*	£ *s.* *d.*	£ *s.* *d.*
Not exceeding 5*l.* per annum - -	0 0 6	0 3 0	0 6 0
Exceeding—			
5*l.* and not exceeding 10*l.* - -	0 1 0	0 6 0	0 12 0
10 ,, ,, 15 - -	0 1 6	0 9 0	0 18 0
15 ,, ,, 20 - -	0 2 0	0 12 0	1 4 0
20 ,, ,, 25 - -	0 2 6	0 15 0	1 10 0
25 ,, ,, 50 - -	0 5 0	1 10 0	3 0 0
50 ,, ,, 75 - -	0 7 6	2 5 0	4 10 0
75 ,, ,, 100 - -	0 10 0	3 0 0	6 0 0
For every full sum of 50*l.*, and also for any fractional part of 50*l.* thereof -	0 5 0	1 10 0	3 0 0

(3.) Of any other kind whatsoever not hereinbefore described - - - - - - - - - - 0 10 0

(*d.*) COUNTERPARTS, ETC.

Deed stamps, etc.

Any conveyance by deed not otherwise specially charged is to be stamped with a 10*s.* stamp, commonly called a deed stamp. Counterparts and duplicates of instruments charged with a duty not amounting to 5*s.*, are liable to the same duty as the originals; and in all other cases, are liable to the duty of 5*s.* (s. 72).

STAMP ACTS, DECISIONS UPON.

Stamp Act,—rules for construction of.

The following points have been decided upon the Stamp Acts: The Acts are to be strictly construed, neither enlarging nor restricting their application (*t*); and in case of ambiguity, the construction is to be in favour of the subject's exemption (*u*).

(*t*) *Morley* v. *Hall* (1834), 2 Dow. 494; *Phillips* v. *Morrison* (1844), 12 Mee. & W. 740; *Mortimore* v. *Inland Revenue Commissioners* (1864), 2 H. & C. 838.

(*u*) *Inland Revenue Commissioners* v. *Angus* (1889), 23 Q. B. D. 579.

And it is legitimate to so frame a document, as that it shall be exempt from duty altogether or be subject only to some less duty (*x*),—although the true character and effect of the instrument is what determines, in all cases, the duty upon it (*y*).

An instrument which contains two distinct operative parts must be stamped in respect of each (*z*) ; but an instrument which has but one distinct operation, being duly stamped in respect of that (*a*), or (if that be exempt) being unstamped (*b*), need not be stamped in respect of matters merely auxiliary or incidental thereto ; but every deed must have, at the least, a deed stamp upon it.

Divers mines, in one demise.

Different quarries or mines may be demised by the same deed, at distinct rents, and one stamp for the gross amount of the rents will be sufficient (*c*),—*scil.*, where the demise is really only one demise ; *secus*, when not so (*d*). What purports to be a *sale* of coal may not be liable as a conveyance at all (*e*), but at the most as a lease or license only (*f*). Also, a lease (which is properly regarded as a lease and which is stamped as a lease accordingly) is properly so stamped, and it does not become a sale merely because it may contain an option of purchase (*g*). A license conferring a mere right of entry and search would not, of course, be regarded as a lease for any purposes of stamp duty ; *secus*, if it were (in effect) a lease, as a mining license in general is.

Lost and destroyed demises, etc.

If an instrument (requiring to be stamped) has been lost or destroyed, and it is known that the instrument was unstamped, no secondary evidence of its contents is admissible (*h*) ; and where it is not known that the instrument was unstamped, the onus of proof is on the party alleging that it was unstamped (*i*), but such onus will be readily shifted on to the other party (*k*). A stamp may be affixed, even in the course of the trial (*l*). In

(*x*) *Inland Revenue Commissioners* v. *Angus* (1889), 23 Q. B. D. 579.
(*y*) *Christie* v. *Inland Revenue Commissioners* (1867), L. R. 2 Exch. 46 ; *Limmer Asphalte Co.* v. *Inland Revenue Commissioners* (1872), L. R. 7 Exch. 211.
(*z*) 54 & 55 Vict. c. 39, s. 3 (2).
(*a*) *Limmer Asphalte Co.*, *supra*.
(*b*) *Walker* v. *Giles* (1849), 18 L. J. C. P. 328.
(*c*) *Boase* v. *Jackson* (1822), 3 B. & B. 185 ; *Blount* v. *Pearman* (1834), 1 Bing. N. C. 408.
(*d*) *Doe* d. *Copley* v. *Day* (1811), 13 East, 241.
(*e*) *Phillips* v. *Morrison* (1844), 12 Mee. & W. 740.
(*f*) *Gowan* v. *Christie* (1873), L. R. 2 H. L. Sc. 273.
(*g*) *Workington* v. *Warrington* (1848), 5 C. B. 635 ; 17 L. J. C. P. 117.
(*h*) *Rippener* v. *Wright* (1819), 2 B. & Ald. 478 ; *Smith* v. *Henley* (1844), 13 L. J. (N.S.) Ch. 221.
(*i*) *Closmadeuc* v. *Carrel* (1856), 18 C. B. 36.
(*k*) *Marine Co.* v. *Haviside* (1872), L. R. 5 H. L. Cas. 624.
(*l*) *Burton* v. *Kirkby* (1816), 7 Taunt. 174 ; 2 Marsh. 480.

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STAMP DUTIES AND REGISTRATION.

equity, a cause will be allowed to stand over to enable a proper stamp to be obtained, or the cause may proceed upon an order that the decree shall not be delivered out till the instrument has been produced to the registrar duly stamped (*m*). It has been decided, that if a deed bearing the proper stamp is produced, but the deed is proved not to have been stamped at the time of its execution, it will be receivable in evidence, without inquiry when the stamp was affixed on payment of the proper penalties (*n*) ; but if the stamp is required by law to be affixed within a given time, the court must, of course, inquire into the time (*o*).

(ii.) Registration of title.

Mines—owned as a several inheritance.

Where mines are held as a separate inheritance, the title thereto may be registered under the Land Transfer Act, 1875 (*p*), equally as a title to land generally. And upon every registration of title to land, it is provided, by s. 18 of that Act, as modified by s. 18 of the Land Transfer Act, 1897 (*q*), that the land the title to which is so registered shall remain subject to all (if any) rights to mines and minerals and mining rights, being rights created before January 1st, 1898, or otherwise before the registration. Also, if the several inheritance of the mines is proved to the satisfaction of the registrar, he is required to enter a note of such several title to the mines over against or opposite to the registration of the title to the land (*r*). On the other hand, when it is proved, or it otherwise clearly appears, that the proprietor of the land is proprietor also of the mines, the title as registered is to be a title to the land and to the mines, the proper note to that effect being entered against the registration of the title to the land (*s*).

Mines,—owned by surface-owner.

Mines,—transfers of ; and leases of.

And upon any subsequent transfer of registered land without the mines, the transferee is to be registered as the proprietor of the land, the requisite note being added to show that the mines are excepted,—and so in the case of a partial exception ; and the transferor is to be registered as the proprietor of the mines, —assuming that he is entitled to them (*t*) ; and the like pro-

(*m*) *Huddleston* v. *Briscoe* (1805), 11 Ves. 595 ; *Chervet* v. *Jones* (1822), 6 Madd. 267.

(*n*) *Rex* v. *The Inhabitants of Preston* (1834), 3 Nev. & Man. 31 ; 5 Barn. & Ad. 1028.

(*o*) *Huddleston* v. *Briscoe* (1805), 11 Ves. 595 ; *Gatty* v. *Fry* (1877), 2 Ex. D. 265.

(*p*) 38 & 39 Vict. c. 87, s. 86.

(*q*) 60 & 61 Vict. c. 65.

(*r*) Land Transfer Rules, 1898, r. 177. The note is to be entered in the Property Register.

(*s*) *Ibid.*, r. 176. The note is to be entered in the Property Register.

(*t*) *Ibid.*, r. 87.

visions, *mutatis mutandis*, are applicable to the case of the transfer of the mines within or under registered land, without the land (*u*); but even where the compulsory provisions of the Land Transfer Act, 1897, are in force, mines held separately from the surface need not be registered (*x*). And, *semble*, where the mines are in lease, then whether (subject to the lease) they are owned separately from the land or not, the entry of the title to the mines will show the lease as an *incumbrance* on the title by the due notice of the lease being entered; and in any case, the mines will remain subject to the lease (*y*).

(*u*) Land Transfer Rules, 1898, r. 88.
(*x*) 60 & 61 Vict, c. 65, s. 24.
(*y*) 38 & 39 Vict. c. 87, ss. 50, 51, and s. 18 (7).

CHAPTER XII.

ON RIGHTS OF WAY, AND OF WATER,—AND ON OTHER SURFACE RIGHTS.

(i.) Rights of way.

Ways of Necessity.

Ways of necessity, generally;

A GRANT or exception of mines with the right to get them implies, as a necessary incident of the grant or exception, a power to get at them and to otherwise enjoy them (*a*). For just as, where the trees on the land are excepted in a demise of the land, the lessor has a right to enter upon the surface and to fell the trees (*b*); and just as, where a close of land belonging to A. and wholly surrounded by other lands also belonging to A. is sold by A.,—or where, on his sale of the other lands, that particular close is retained by or reserved to A.,—a right of way to the close (*scil.*, being a way of *necessity*) is impliedly granted (*c*) or reserved (*d*); so (and for the same reason) where the mines are excepted on a sale of the surface, a right of way to get the mines is impliedly reserved,—*scil.*, where, in the exception of the mines, the right to get the mines is also expressly excepted (*e*), but not where such right is not so excepted (*f*).

and in respect of mines, in particular.

Way of necessity,—direction of way.

The right of way, when it is a way of necessity, is to be exercised in some convenient direction (*g*); and the direction in which the right of way is to run will, in general, be defined; and no material deviation can be made from the defined route,—although by acquiescence the deviation will be sanctioned (*h*).

Where no definite route is prescribed, then (according to *Richards* v. *Richards* (*i*) the mine-owner (or mining-lessee) is free to construct his road in the direction most convenient for

(*a*) Shep. Touch. 89.
(*b*) *Liford's Case* (1615), 11 Rep. 46 b.
(*c*) *Gayford* v. *Moffat* (1868), L. R. 4 Ch. App. 135.
(*d*) *Clarke* v. *Cogge* (1607), Cro. Jac. 170.
(*e*) *Dand* v. *Kingscote* (1840), 6 Mee. & W. 174; *Durham Railway* v. *Walker* (1842), 2 G. & D. 343.
(*f*) *Harris* v. *Ryding* (1839), 5 Mee. & W. 66.
(*g*) *Stable* v. *Hayden* (1702), 6 Mod. 3.
(*h*) *Mold* v. *Wheatcroft* (1859), 27 Beav. 510; 29 L. J. Ch. 11.
(*i*) (1859), John. 255.

his own purposes (being, of course, purposes incident to the working and getting of the mines) ; and he need not choose the shortest practicable route.

Access impossible,—effect of.

If there be a contract for the sale or letting of a (mining) property, and it is discovered before completion of the contract that there is no sufficient means of access to it, the contract will not be enforced at the suit of the intending vendor or lessor (*k*) ; and the same rule would apply, where there was a contract to grant a way-leave, and the way-leave (if granted) would be useless, by reason of the grantee being unable to procure (the intention upon which the contract was entered into being that he should procure) a lease of certain intervening land (*l*).

Other rights of necessity,—generally.

Besides ways of necessity, other surface rights limited by the necessity of the case, may be implied upon the grant or exception of mines (*m*).

Estate itself,—not enlarged by the right of working.

Where lands containing mines are devised to A. for her life without impeachment of waste, and an express power is given to A. to work and get the mines, that express power adds nothing to the implied power of A. ; and if the express power conferred on A. is a power to work or to lease the mines, A. takes no power thereby to lease for longer than her own life (*n*), —the words merely intending that she may get the mines either by herself or her lessee, but (in either case) during her own life only ; and in fact the power is a restriction rather than a power.

MINES IN COPYHOLD LANDS,—AND IN ENFRANCHISED COPYHOLDS.

Lord's title to mines in copyhold lands,—no necessary right of access to.

But although under an express exception or reservation of mines, there is implied a liberty to enter and get them, no such liberty is implied where the so-called exception or reservation is not really an exception or reservation,—*e.g.*, upon the grant of a copyhold estate, the mines and minerals remain the property of the lord, but not by way of *exception* out of the grant, but by reason merely of the estate of the copyholder being a tenancy at will,—so that the lord cannot (save under a special custom entitling him to do so) enter on and bore through the surface

(*k*) *Denne* v. *Light* (1857), 8 De G. M. & G. 774.
(*l*) ——— v. *White* (1709), 3 Sw. 108, n.
(*m*) *Rogers* v. *Taylor* (1857), 1 H. & N. 828 ; *Darcy* v. *Askwith* (1617), Hob. 234.
(*n*) *Vivian* v. *Jegon* (1868), L. R. 3 H. L. Cas. 285.

of the copyhold, for the purpose of getting the mines thereunder (*o*); for the possession is in the copyholder from the surface to the centre; and any third party (or even, *semble*, the lord himself or the lord's lessee), who from his adjoining workings enters upon the *subsoil*, commits a trespass for which the copyholder may sue (*p*); but, of course, under a special custom, the lord may enter upon both the surface and the subsoil in order to get the minerals (*q*).

Enfranchised copyholds,—getting of mines under.

Under the usual exception of mines and minerals with power to get them by surface workings and otherwise,—where the exception is contained in an enfranchisement deed, the power to get may not be so exercised as to cause a subsidence of the surface (or of the buildings thereon); and this is so, although the excepted minerals cannot be gotten at all, save with a subsidence (*r*),—so that the exception of mines is, in such a case, a barren exception,—unless larger rights of working (including a right to subside the surface) are also excepted,—as they may be,—and as is usually (or sometimes) the case under Inclosure Acts (*s*).

Implied Surface Rights of Access, Etc.

Lead mines (Derbyshire),—implied surface rights, and limit of.

In *Marshall* v. *Borrowdale Plumbago Co.* (*t*), where the defendant company were crown grantees of the "wad" (or pencil lead ore) under the S. farm,—with an implied right to work and get the lead ore, but with no express liberties or powers of working and getting it; and it appeared that the company had erected on the plaintiff's lands (parcel of the farm) certain lead-crushing machinery, including a mill; and that they had constructed over other portions of the plaintiff's lands a goit (or water-course) for conveying the water to the mill; and that they had also deposited large heaps of mine refuse and rubbish on other parts of the plaintiff's lands—the court held that, under the implication of working rights, the company were entitled to all such surface rights as would be reasonably required for working and getting the lead ore; and that the company might use the new processes as well as the old processes of working and getting the same; but, upon the facts, the court was of opinion,

(*o*) *Bourne* v. *Taylor* (1808), 10 East, 189.
(*p*) *Lewis* v. *Braithwaite* (1831), 2 B. & Ad. 437.
(*q*) *Brown* v. *Rawlins* (1806), 7 East, 409.
(*r*) *Hext* v. *Gill* (1872), L. R. 7 Ch. App. 699.
(*s*) *Wakefield* v. *Duke of Buccleugh* (1867), L. R. 4 H. L. Cas. 377; *Att-Gen.* v. *Welsh Granite Co.* (1887), 35 W. R. 617.
(*t*) (1892), 8 T. L. R. 275.

that the company had exceeded what was reasonable both as regards the spoil-heaps and as regards the lead-crushing machinery, all rights which arise by implication only being strictly limited by what is reasonably necessary for the purposes of the grant ; and the company could not, under such implied rights, convert the lead ore into lead on the plaintiff's surface lands ; and still less could they, *e.g.*, make or manufacture thereon pencils from the lead gotten and worked from the mines.

Allotments, —implied surface rights, in case of.

In *Hayles* v. *Pease* (*u*), where, upon the inclosure of a common under the provisions of a local inclosure Act, the mines were excepted to the lord, and he was (by the Act) required to pay compensation for any surface damage which he might occasion through working and getting the mines,—but the Act did not expressly grant the right to work and get the mines, or define what rights of working he should have,—the court said that all such powers of working were impliedly given as were reasonably sufficient to enable the lord (or his lessees) to get the mines and to carry them away,—so that, *e.g.*, he could affix the necessary machinery to the surface for draining and drawing the mines, and use other (ordinary) surface rights,—as for heap-room, etc. ; and he could also sink pits and shafts.

Excepted coal seams,—implied rights, in case of.

In *Gerard* v. *London and North Western Rail. Co.* (*x*), where a landowner had (under the compulsory provisions of the Railways Clauses Consolidation Acts) parted with his surface lands and of the mines (other than the coal mines) therein to a railway company, and he proceeded to claim present or immediate compensation for the coal, alleging that he could not get it without "trespassing" upon the *lower strata* sold to the railway company (and without also causing a subsidence of such lower strata), the court decided that the claim was premature, and incidentally said that the exceptee of the coal could lawfully (if it was necessary to) cut into and through the lower strata to get at the coal,—equally as he could also (according to *Ruabon Co.* v. *Great Western Rail. Co.* (*y*)), cut through the horizontal surface (where that was necessary) to get at the coal.

Mines under waste lands, —implied surface rights, in case of,—

Where the lord of a manor is entitled (and he usually is entitled) to the mines in the waste or common of the manor, he may in the exercise of his right to work and get such mines

(*u*) [1899] 1 Ch. 567.
(*x*) [1894] 2 Q. B. 915 ; [1895] 1 Q. B. 459.
(*y*) [1893] 1 Ch. 427.

CHAP. XII. RIGHTS OF WAY.

deprive (or in part deprive) the commoners of the profits of the common (*z*); but, in the general case, and apart from special custom (*a*), the lord or his grantee (*b*), if he appropriate any particular part of the common, must elsewhere in the common leave a *sufficiency* for the commoners (*c*),—which sufficiency is a question of fact (*d*).

(1) As to damaging surface.

In *Hall* v. *Byron* (*e*), the court said, with reference to the lord's right to dig sand, gravel, etc., in the waste lands, that the onus of proving the insufficiency of the common rested with the commoners, and not (as in the case of approvement) with the lord,—the lord's right to dig for and take the sand, gravel, etc., being incidental to his ownership of the soil; and the tenants can complain only in case the lord is unduly availing himself of his ownership of the soil.

(2) As to appropriating surface.

The appropriation by the lord of portions of the common to such an extent as to exclude the commoners altogether from their rights of turbary and estovers, is only justifiable under a special custom; but in *Lascelles* v. *Onslow* (*f*), such a custom was considered to be proved,—as against the copyhold tenants of the manor; and being proved against the copyholders, it was deemed to be conclusively proved against the freeholders also of the manor.

Compulsory severance,—rights in case of.

Where the severance of the mines from the surface has arisen upon the compulsory acquisition of the lands under the Railways Clauses or Waterworks Clauses Acts,—or under the Lands Clauses Consolidation Act, 1845,—there are specific provisions contained in the Acts relative to and regulative of the subsequent working and getting of the excepted mines; and these specific provisions have been already dealt with, in Chapter V., *supra*.

Surface rights,—what are "necessary or proper,"—or "necessary and usual,"—on a demise of mines.

In *Morris* v. *Rhydydefed Colliery Co.* (*g*), where there was a settlement of land and mines, with a power to grant building leases and a (distinct and independent) power to lease the mines with the "necessary or usual" surface rights,—but so that the lessees should not be expressly made dispunishable for waste;

(*z*) *Hall* v. *Byron* (1876), 4 Ch. D. 667.
(*a*) *Arlett* v. *Ellis* (1827), 7 Barn. & C. 346.
(*b*) *Glover* v. *Lane* (1789), 3 T. R. 445.
(*c*) *Sadgrove* v. *Kirby* (1795), 6 T. R. 485; *Shakespeare* v. *Peppin* (1796), 6 T. R. 748.
(*d*) *Smith* v. *Feverel* (1675), 2 Mod. 6; *Glover* v. *Lane* (1789), 3 T. R. 445; *Grant* v. *Gunner* (1809), 1 Taunt. 438; *Arlett* v. *Ellis*, *supra*; *Drury* v. *Moore* (1815), 1 Stark. 102. See *Badger* v. *Ford* (1819), 3 Barn. & Ald. 153.
(*e*) (1876), 4 Ch. D. 667.
(*f*) (1877), 2 Q. B. D. 433.
(*g*) (1858), 3 H. & N. 473, 885.

and in purported exercise of the power to lease the mines, a lease of the coal mines had been granted with liberty to get etc., and to erect all such buildings as should be "necessary or proper," and to dig and take stone, etc., for the purpose,—the court said the power was well exercised, and had not been exceeded, the jury having found that the erection of buildings was usual in the case of such a lease of coal; and the court said that "*necessary* or *proper*" meant (in effect) "*usual*,"—in other words, that whatever could not be dispensed with, if the mine was to be worked "*with reasonable efficiency and success*," was necessary; *scil.*, because the word "necessary" was not to be construed as meaning absolutely necessary, but as meaning that which, according to the usage of miners, working with ordinary skill, would be necessary for carrying on the works; and, of course, whatever was necessary would not be waste, being the ordinary enjoyment of the demised premises.

APPARENT AND CONTINUOUS EASEMENTS.

Easements,—implied, in favour of grantee;

An easement of necessity passes without express words; *e.g.*, in the grant of a landlocked tenement, a way of necessity will pass,—*scil.*, in such direction as the owner of the servient tenement shall appoint (*h*). Also, continuous and apparent easements (*e.g.*, watercourses) will pass without express words (*i*); and for this purpose, an easement (*e.g.*, a right of way) which is not, strictly speaking, continuous and apparent, will be deemed continuous and apparent, where the easement (*e.g.*, of way) is to be exercised over an already existing line of road (*j*): But although the grantee is in that manner provided for, the grantor himself must take care to expressly reserve in his own favour any easements (even continuous and apparent easements and easements deemed continuous and apparent), if the land retained by him requires same for its better enjoyment (*k*); but no express reservation of a way of *necessity* is, in such a case, required (*l*).

but not in favour of grantor.

(*h*) *Bolton* v. *Bolton* (1878), 11 Ch. D. 968.

(*i*) *Wheeldon* v. *Burrows* (1878), 12 Ch. D. 31.

(*j*) *Langley* v. *Hammond* (1868), L. R. 3 Exch. 161; *Watts* v. *Kelson* (1870), L. R. 6 Ch. App. 166; *Brown* v. *Alabaster* (1887), 37 Ch. D. 490.

(*k*) *Wheeldon* v. *Burrows*, *supra*; but see *Thomas* v. *Owen* (1887), 20 Q. B. D. 225.

(*l*) *London* (*Corporation*) v. *Biggs* (1880), 13 Ch. D. 798.

COMMON SHAFTS.

Implied rights in respect of a common shaft.

In *Clegg* v. *Clegg* (*m*), where the surface of one estate was devised to A., and the surface of another estate adjoining was devised to B., and the minerals under both estates were devised to A. and B. as tenants in common in equal shares ; and it appeared that there was a shaft in the surface devised to A.,—sunk by the testator himself for the purpose of getting the mines under both estates, and subsequently carried down much deeper by the lessee (claiming under A. and B.) of the mines,—the court was of opinion, that the shaft (although the mouth thereof was in the surface of A.'s land) belonged in common to both A. and B., having been constructed for their common benefit and (in effect) at their joint expense : Consequently, A. alone or B. alone could not, without the concurrence of the other, sanction the use of the shaft for raising foreign coal to the surface ; or, at all events, A. and B. were equally entitled to the shaftage rent payable in respect of the foreign coal.

EXPRESS RIGHTS OF WAY, ETC.

Express rights,—necessity for.

By reason of the limited character of the surface rights which are implied in mining grants and in mining exceptions, it is usual to give and grant (or, in the case of an exception, to except and reserve) also express rights over the surface,—and in particular, way-leave rights and water-rights, and rights to deposit on specified parts of the surface the mines and mine-refuse gotten out of the mines. And as regards all such surface rights so expressly granted or reserved, it is a general rule of law, that in the construction of the grant or of the exception, they shall be construed liberally in favour of the grantee or exceptee,—due regard being also paid to the customary modes of working mines within the locality or district where the mines are (*n*); and the presumption always is in favour of the right to use all new improvements in the working of the mines (*o*).

EXPRESS WAYS, VARIETIES OF,—AS DEPENDENT ON GRANT.

Express rights,—variable with

In *Pit* v. *Clavering* (*p*), where the vendor of a manor had reserved *a convenient way-leave* for the carriage of coals through

(*m*) (1861), 3 Giff. 322.
(*n*) *Case* v. *Midland Rail. Co.* (1859), 27 Beav. 247.
(*o*) *Dand* v. *Kingscote* (1840), 6 Mee. & W. 174.
(*p*) (1729), 1 Barn. 318.

the waste to a certain river ; and subsequently to the sale and reservation, timber waggon-ways having been introduced and become in general use in the locality, he constructed a waggon-way under the reserved liberty of way-leave,—the court was of opinion, that the waggon-way was within the reservation. And in *Senhouse* v. *Christian* (*q*), where the reservation was of a free and convenient way, with liberty to make and lay causeways, and to carry coals, the court held, that a framed waggon-way might be lawfully constructed and used. And in *Dand* v. *Kingscote* (*r*), under the reservation of *way-leave and stay-leave*, the court held, that a modern railway might lawfully be constructed, PARKE, B., saying :—That the object of the reservation was to get the coal *beneficially*, and that there passed by it a right to such a description of way-leave as would be reasonably sufficient to enable the coal owner to get the coal at a reasonable profit ; and the owner was not confined to such a description of way as was in use at the time of the grant.

modern improvements in carriage ;

In all the above cases, it is to be noted, that the reservation was of a mineral way ; and that, although the way was improved, its distinctive character or purpose was not altered ; and apparently, the character of the way may not be altered.

not altering the character of the way.

EXPRESS WAYS, VARIETIES OF,—AS DEPENDENT ON USER.

Ways, varieties of.

It is said by COKE, that there are three kinds of ways ; first, a footway, which is called *iter* ; second, a footway and horse-way, which is called *actus*, and vulgarly a pack and prime-way, because it is both a footway, which was the first, or prime-way, and a pack or drift-way also ; and third, a *via*, or *aditus*, which contains the other two, and also a cart-way, etc. (*s*). And here it is to be observed, that although all rights of way are supposed to originate in grant, yet they depend, in the majority of cases, upon actual user, not only for their existence, but also for their extent (*t*). Thus, by force merely of the user, a way may be confined to agricultural purposes (*u*), or to the carriage of coals (*x*) ; or it may extend to the passage of all articles except coals (*y*) ; but a general right of way will be proved, by proof

User,—as determining the character of the way.

(*q*) (1787), 1 T. R. 560.

(*r*) (1840), 6 M. & W. 196 ; and see *Bishop* v. *North* (1843), 11 Mee. & W. 418 ; 12 L. J. Exch. 362.

(*s*) Co. Litt. 56 a. See Just. Inst., lib. 2, t. 3.

(*t*) *Williams* v. *James* (1867), L. R. 2 C. P. 577.

(*u*) *Reignolds* v. *Edwards* (1741), Willes, 282.

(*x*) *Iveson* v. *Moore* (1699), 3 Raym. 291 ; 1 Salk. 15.

(*y*) *Marquis of Stafford* v. *Coyney* (1827), 7 B. & C. 257.

of user for all purposes for which it was wanted,—say, for twenty years (*z*). Also, in *Ballard* v. *Dyson* (*a*), and again in *Williams* v. *James* (*b*), the judges were plainly of opinion, that the actual user was, in all cases, the measure of the right.

WAYS, ALTERATION IN CHARACTER OF.

Way,—sometimes available for all possible uses of the tenement; but more usually for certain limited uses only.

In *Wimbledon Common* (*Conservators*) v. *Dixon* (*c*), where the question was, whether the defendant was entitled to convert a piece of land forming part of a certain farm into sites for houses, and to use (for the purpose of bringing the building materials on the land, and for all purposes connected with the houses when built) a right of way which the owners and occupiers of the farm had from time immemorial (and for the purposes of their farm) enjoyed over the common lands,—the court answered the question in the negative, saying that the evidence of user (whereby the character or extent and measure of the right of way was to be ascertained) amounted only to evidence of a general right for all purposes as a farm or field, and did not evidence a general right of way to the field when converted into a town or village. However, in *Newcomen* v. *Coulson* (*d*), where the road had been set out, under an Inclosure Act, for the use of the allottees, and the owner of one of the allotments commenced building houses upon it, and began to lay down a metalled road where there had been only an ordinary cart track before,—the court held, that the allottees were not confined to the use of the road for agricultural purposes, but were entitled to construct a substantial roadway suitable for the purposes to which the land was in course of being applied.

Ordinary way,—distinguished from mineral way.

Where lands were sold by A. to B., excepting the mines to A. with liberty to work them otherwise than from or on the surface, and excepting also to A. a "*waggon or cart road*" in a defined route leading from other lands of A. to a public highway,—the court said that the exception was not of a way for the *mines*, but was of an ordinary way (*e*); and consequently the waggon road could not be converted into a railroad,—although, if it had been a way to the mines and for the mines, it might have been so converted, according to *Dand* v. *Kingscote* (*f*).

(*z*) *Cowling* v. *Higginson* (1838), 4 M. & W. 245; *Higham* v. *Rabbett* (1839), 5 Bing. N. C. 622.
(*a*) (1808), 1 Taunt. 279.
(*b*) (1867), L. R. 2 C. P. 577.
(*c*) (1875), 1 Ch. D. 362.
(*d*) (1877), 5 Ch. D. 133; and see *Morris* v. *Bradburn* (1876), 3 Ch. D. 812.
(*e*) *Bidder* v. *North Staffordshire Rail. Co.* (1878), 4 Q. B. D. 412.
(*f*) (1840), 6 Mee. & W., 174.

Where a way of necessity is impliedly granted or is impliedly reserved, the way can only be used for the purposes for which it was then necessary (*g*). Also, a way (or other easement) which exists only by user (or implied grant) is limited by the actual past user (*h*); and where it arises by express grant, the quality of the way (whether limited to certain purposes or available for all purposes) will depend upon the true intention (or true construction) of the grant (*i*); and the law is the same, where the right of way arises under the provisions of an Inclosure Act (*k*).

Way,—ascertainment of the purposes for which it is usable;

In *Bradburn* v. *Morris* (otherwise *Morris* v. *Bradburn*) (*l*), M. was the owner of a close of land with a right of way thereto over an occupation road (the soil of which was in C.), and M. sold the surface of his close to B. reserving the minerals,—and in the conveyance to B., the court directed that there should be reserved to M. in respect of the occupation road such right (if any) as M. then had to the use of that road for getting his reserved minerals,—the court saying that B. could not possibly re-grant him more than that,—*scil.*, in the absence of C. who was the owner of the soil of the road.

Where the purpose should be left uncertain.

INVALID OR PRECARIOUS USER.

No right of way will, of course, arise by mere user, when the user is precarious; as, *e.g.*, when a right of way is enjoyed by usurpation over a waggon-way the continuance of which depends upon the will of the owner of the waggon-way (*m*); or generally where the user is not *as of right*, but is upon sufferance, or is clandestine (*n*).

User,—must be *as of right*, in order to give right of way.

INVALID GRANT,—BECOMING VALID.

Where a man purports to grant a right of way,—and his grant is inoperative by reason of his having no estate at the time out of which the right of way is to arise; if he should subsequently, and during the period for which the right of way was to be enjoyed, became entitled to the estate necessary for the validity of the grant, then the right of way will be deemed

Grant,—subsequent validation of.

(*g*) *London* (*Corporation*) v. *Biggs* (1880), 13 Ch. D. 798.

(*h*) *Wimbledon Common* (*Conservators*) v. *Dixon* (1875), 1 Ch. D. 362.

(*i*) *Bidder* v. *North Staffordshire Rail. Co.* (1878), 4 Q. B. D. 412.

(*k*) *Newcomen* v. *Coulson* (1877), 5 Ch. D. 133; *Finch* v. *Great Western Rail. Co.* (1879), 5 Ex. D. 254.

(*l*) (1876), 3 Ch. D. 812.

(*m*) *Arkwright* v. *Gell* (1839), 5 Mee & W. 203.

(*n*) *Dawson* v. *Norfolk* (*Duke*) (1815), 1 Price, 246.

to have been validly granted, and will arise accordingly (*o*). Also in *Newmarch* v. *Brandling* (*p*), where the plaintiff was the assignee of a certain colliery and of a right of way-leave therefrom to a river, the way-leave running in part over a waggon-way of other colliery-proprietors and which they had constructed with the leave or license of the defendant ; and it appeared that the way-leave had been granted by the defendant (with the privity or assent of these other proprietors) for a term of twenty-one years determinable by a year's notice on either side ; and the complaint on the part of the plaintiff was, that the defendant, having acquired the rights of the other colliery proprietors to the waggon-way, had threatened (and was intending) to take up the waggon-way so soon as a new waggon-way (then constructing) was completed,—whereby the plaintiff would lose his way-leave, without getting the year's notice which the defendant's grant entitled him to get ; and the defendant contended, that the plaintiff's use of the old waggon-way (so far as regarded the other colliery proprietors) was at sufferance or was otherwise determinable at will, and said that he proposed determining it *as assignee of these others* and not as such grantor as aforesaid,—the court said, that he could not so escape from the necessity of giving the notice required by his own grant,—*scil.*, because that would be in derogation of his grant.

WAYS, EXTENSIONS OF,—LAWFUL AND UNLAWFUL.

Right of way, —to a highway, and to a private place,—distinction between.

A right of way from and to close A. over close B. to and from a highway adjoining close B. entitles the owners and occupiers of close A. to go to and from any place beyond to which the highway leads (*q*) ; but a right of way from and to close A. over close B. to and from close C. does not entitle the owners and occupiers of close A. to use the right of way for going to (or for coming from) a place beyond close C. (*r*),—a distinction which necessitates that the way-leave rights (as well over the surface as underground) to be conferred by mining leases (including grants and exceptions of mines) shall be unambiguously expressed as regards both the *teminus à quo* and the *teminus ad quem* ; *e.g.*, a right of transit from colliery A. across colliery B. for the purpose of getting the minerals within

(*o*) *Newmarch* v. *Brandling*, *infra*.
(*p*) (1818), 3 Sw. 99.
(*q*) *Colchester* v. *Roberts* (1839), 4 Mee. & W. 769.
(*r*) *Williams* v. *James* (1867), L. R. 2 C. P. 577.

and under close C. beyond but adjoining B., and thereafter transporting them across B. to colliery A., would not extend to authorise a transit from A. to and from any mineral field lying beyond C.; and a mere right of getting and winning the minerals in two adjoining collieries by outstroke or instroke would not give any right of transit to and from a colliery beyond,—but the right of transit would require to be distinctly and specifically granted (and at an adequate way-leave rent) if such was the intention.

Adjoining mineral properties,—the special rights of way for either, not available for the other;

In *Dand* v. *Kingscote* (*s*), where there was a common vendor; and upon the sale of certain lands (constituting the township of Amble) the minerals were reserved, together with the usual surface and other mining rights; and upon the sale of certain other lands adjoining (constituting the township of Hauxley) the minerals were reserved, together with the usual surface and other mining rights,—and the excepted minerals under both townships afterwards vested in the defendant,—and he proceeded to sink a shaft in Hauxley, about a quarter of a mile from the boundary of Amble, in order to win the Hauxley coal and the coal in Amble, and for that purpose he made a drift between the Hauxley and the Amble coal,—and he also constructed a railway over the lands in both townships for the purpose of conveying the coal to the river Coquet, and thence to the sea,—It was held, that under the Amble reservation, no easements were reserved, except for getting the coals within the lands in Amble; and the same rule applied to Hauxley; and no greater effect could be given to those deeds, in consequence merely of the contiguity of the two townships, or of the fact that the coals in each were part of the same mineral field, and had originally belonged to the same vendor.

The like limited construction was also put upon the reservation of way-leaves contained in certain leases of the surface (excepting the minerals) executed by the dean and chapter of Durham (*t*).

unless expressed so to be in the original creation.

Where the way-leave or right of way arises under an express grant or reservation, the extent of the right being usually a mere matter of construction,—it may be, that, upon the true construction of the grant or reservation, the way-leave will be available for other minerals than those comprised in the

(*s*) (1840), 6 Mee. & W. 174.
(*t*) *Wallis* v. *Harrison* (1842), 11 L. J. (N.S.) Exch. 440; *Durham and Sunderland Rail. Co.* v. *Walker* (1842), 2 Q. B. 963.

exception to which the reservation is annexed (*u*) ; or it may be, that the way-leave is strictly available only for (and limited by) the minerals comprised in the exception (*x*).

CONTAINING CHAMBER,—CARRIAGE OF ADJOINING MINERALS THROUGH.

Containing chamber,—use of, for carriage of adjoining minerals through :—(*a*) In the case of freehold lands : (1) Generally ;

Whatever may be granted may be excepted ; and a right of way may therefore be excepted, whether it is properly described as an exception or as a reservation (*y*). Accordingly, in *Graham* v. *Duke of Hamilton* (*z*), where the defendant duke had granted to the plaintiff certain lands, excepting all and sundry coal and limestone therein or thereunder, with power to dig and win the same ; and the duke claimed the right to make and use a passage through the coal and limestone so excepted for the conveyance of other minerals of the like sort in certain adjoining lands,—the court held, that he had such right,—*scil.*, because the rights reserved were not easements,—in which case, they could only have been used for the particular purposes for which they were originally created ; but they were, in fact, rights of property, portion of the original *dominium* of the grantor ; and the grantor retained therefore the same unlimited power of enjoyment of the estate that remained in him. And in *Ramsay* v. *Blair* (*a*), where there were three grants of land excepting the minerals, and the reserved rights of working were exercisable as well within the exceptions as also over the soil granted,—the court distinguished, and said, that the reserved rights, so far as exercisable within the exceptions, were not easements but rights of ownership ; but that, so far as they were exercisable not within the solum that was excepted, but over and through the solum that was granted, they were easements.

(2) Where surface is in possession of lessee.

In *Proud* v. *Bates* (*b*), the plaintiff was the lessee (or claimed under the lessee) of certain lands containing mines, and which were formerly part of the waste of a manor ; and the defendant was the lessor (or claimed under the lessor, who was lord of the manor, and as such entitled to the soil of the waste and the mines thereunder) ; and in the plaintiff's lease, the mines and quarries were excepted to the lessor with express mining rights

(*u*) *Midgley* v. *Richardson* (1845), 14 Mee. & W. 595 ; 15 L. J. Exch. 257.

(*x*) *Dand* v. *Kingscote* (1840), 6 Mee. & W. 174.

(*y*) Shep. Touch. 78, 79.

(*z*) (1871), L. R. 2 H. L. Sc. 166 ; and see *Proud* v. *Bates* (1865), 34 L. J. Ch. 406.

(*a*) (1876), 1 App. Cas. 701.

(*b*) (1865), 34 L. J. (N.S.) Ch. 406.

as well underground as upon the surface, but these mining rights were of the usual character ; and the plaintiff complained that the defendant was using the containing chamber of the excepted mines for the carriage of foreign minerals through it, —and the court said (in effect), that he was entitled to do so, the containing chamber being the lessor's old freehold tenement kept entire (although made a separate tenement) ; and the case was wholly unlike (in that particular) the containing chamber of mines within copyhold lands.

(*b*) In the case of copyholds.

EASEMENTS OF WAY, AND PERSONAL LICENSES, DISTINGUISHED.

Personal license,—where right of way not annexed to any land.

The grant of a right of way, unless it is annexed to land,— that is to say, unless it is granted for the purposes of the better enjoyment of certain land,—is not an easement (*c*),—but is a personal license only, and is not transmissible (*d*) ; and it may, in general, be revoked at any time, even where it has been granted by deed (*e*).

WAYS, EXCESS IN USER OF.

Way,—what is, and what is not, an excess in the user of.

In *Skull* v. *Glenister* (*f*), the plaintiff had granted to W. a piece of ground with a right of way thereto, and the defendant was the lessee (claiming under W.) of that piece of ground with the right of way thereto ; and what the plaintiff complained of was the defendant's alleged excess in his user of the right of way, in respect that the defendant was using the right of way for the purpose of carting to and depositing on that piece of ground building materials for houses he was erecting on another piece of ground of which he was the owner, and which lay beyond the first-mentioned piece of ground and had no communication with the road along which the right of way was exercised : and the question was, whether the defendant was abusing (*i.e.*, exceeding in the legitimate use of) the right of way,—such question (as put to the jury) being, whether the defendant was using the way as a way to the piece of ground demised to him by W., or was using it as a way to his own land beyond, the going first to W.'s piece of ground being merely colourable : And the jury found in the plaintiff's favour ; and the court (on the

(*c*) *Ackroyd* v. *Smith* (1850), 19 L. J. C. P. 315.

(*d*) *Keppel* v. *Bailey* (1839), 2 My. & K. 517.

(*e*) *Barraclough* v. *Johnson* (1838), 8 Ad. & El. 99.

(*f*) (1864), 16 C. B. (N.S.) 81.

subsequent argument for a new trial) said, that the question had been properly put to the jury ; and the case followed *Ward* v. *Lawton* (*g*), which had followed 1 Roll. Abr. 391, pl. i. 3, to the effect, that a prescriptive (or other) right of way from A. to B. does not justify going further to C. ; and the same rule had been applied also in *Colchester* v. *Roberts* (*h*).

EXCESS IN USER, ACQUIESCENCE IN.

The excess in the user,—may be cured by acquiescence.

In *Mold* v. *Wheatcroft* (*i*), it appeared that, under a Canal Act, the plaintiffs' predecessors in title had constructed upon the lands of the defendant's predecessors in title a tramroad for conveying their coal and limestone to the canal for carriage,—the site of the tramroad being acquired by agreement subject to a yearly payment of 5*l.* 5*s.* for the use of the site ; and they subsequently substituted for that tramroad a railway constructed over a different and more direct route,—giving up the site of the old tramroad, and paying the old rent of 5*l.* 5*s.* for the site of the new railway,—together with 1*l.* 15*s.* additional for the site of an engine-house which was incidental to the railway ; and such substitution was acquiesced in by the then owner of the surface and by his surface-lessee ; and the defendant subsequently became the owner of the lands, and required the plaintiffs to pay him a rent (sevenfold increased) above the old rent for the use of the railway ; and he forcibly prevented the plaintiffs from using the railway until they agreed to that increased rent,—But the court held, that the defendant was bound by the agreement entered into on the acquisition of the original site, and also by the acquiescence of his predecessors in title in the substitution of the new site,—although, as regards the site for the engine-house, he was entitled to have the value thereof (as on a compulsory purchase) ascertained.

WAY, COMPULSORY ACQUISITION OF.

Way, right of,—continuance of, as upon a compulsory purchase,—where right

In *Powell* v. *Thomas* (*k*) where the plaintiff had constructed a railroad from his collieries to the principal railway of the district,—and the railroad passed over a small part of the defendant's land, the part so passed over being an essential part of the whole railroad ; and the plaintiff had (after constructing the railroad)

(*g*) (1696), 1 Ld. Raym. 75.
(*h*) (1839), 4 Mee. & W. 769, at pp. 773, 774.
(*i*) (1859), 29 L. J. (N.S.) Ch. 11.
(*k*) (1848), 6 Ha. 300.

used it for five or six years before the defendant complained, and under circumstances which induced the plaintiff to believe that the only question between him and the defendant was the question of the price to be paid for the piece of defendant's land which was occupied by the railroad,—the court restrained the defendant from disturbing the plaintiff's possession.

essential, and discontinuance inequitable;

But in *Bankart* v. *Tennant* (*l*), where the plaintiff was (in effect) the lessee under the defendant of certain copper-works (formerly zinc-works), and he had for over seventeen years taken water from the defendant's canal for the use of his works, —without any right to do so, but upon a sort of understanding between him and the defendant that he might do so, while he continued a good customer of the canal; and afterwards the defendant claimed a large lump sum for the seventeen years' use of the water and 5*l. per day* for its future use,—The court found, (1) that the water, although very convenient for the plaintiff, was not essential,—*scil.*, because he could get sufficient water by digging a well; and (2) that the plaintiff's enjoyment of the water had been meanwhile questioned (or objected to) by the defendant; and the court said, that, under these circumstances, and the sort of understanding referred to not bringing the case within the principle of *Ramsden* v. *Dyson* (*m*), the plaintiff should pay the defendant 5*l.* per annum, in lieu of his (extortionable demand of) 5*l.* per day, for the use of the water,—*scil.*, for the plaintiff's past use of the water.

secus, when not essential.

(ii.) Rights of water.

NATURAL RIGHTS OF WATER.

Every riparian owner is, by presumption of law, entitled to the natural *flow* of the water in the river or stream which adjoins or which traverses his lands (*n*); and is entitled also to the natural *purity* of that water (*o*). Therefore no riparian proprietor may either force back the water upon the owners above, or so retard or accelerate its flow as to injure the owners below (*p*); or may either pollute or overheat the water, or otherwise diminish it in quantity or deteriorate it in quality,—*scil.*, unless he can show some special acquired right (or easement) to do so; and

Natural rights,—and easements, distinguished.

(*l*) (1870), L. R. 10 Eq. 141.
(*m*) (1866), L. R. 1 H. L. 129, at p. 170.
(*n*) *Bickett* v. *Morris* (1866), L. R. 1 H. L. Sc. 47.
(*o*) *Wood* v. *Waud* (1849), 3 Exch. 748; *Embrey* v. *Owen* (1851), 6 Exch. 369.
(*p*) *Wood* v. *Waud*, *supra*.

such easement (when it exists) must have arisen either by express grant or by user and prescription (*i.e.*, by implied grant) (*q*),—every such easement being, of course, in derogation of the natural right (*r*).

EASEMENTS OF AND IN WATER.

Appropriation of water, —easements acquired by.

In *Mason* v. *Hill* (*s*), these propositions were affirmed by the court :—That the possessor of land through which a natural stream runs, has a right to the advantage of such stream flowing in its natural course,—and has a right to use it when he pleases for any purposes of his own, *being purposes not inconsistent with the like rights in the riparian proprietors above and below* : That the proprietor above cannot diminish the quantity or injure the quality of the water : That the proprietor below cannot throw back (*i.e.*, pen back) the water,—and that whether the loss by diversion of the water be or be not an actionable injury without proof of damage, yet as soon as any riparian proprietor has applied the water to some purpose of utility, and his continued enjoyment of the water for that purpose is prevented (or interfered with) by the diversion, there is a right of action ; and that a right to divert the water or to pollute or otherwise injure the quality of the water) can only be acquired by grant or by prescription. And it appearing in the case, that the plaintiff had appropriated the water for the purposes of his mill (his predecessor in title having likewise appropriated it for another beneficial purpose connected with the enjoyment of his riparian lands), and that the defendant had diverted the water by means of a dam constructed across the stream,—the court held the plaintiff entitled to recover. Also, the decision in *Bealey* v. *Shaw* (*t*), to the effect that, in the case of a limited prescriptive right of diversion, if the limit of the right were exceeded, there would be a right of action for the excess, was accepted as good law.

Appropriation of water, —interrupting, before complete.

Any mere prior appropriation of natural water will give no instant right to it (*u*) ; and until long use has established the easement, the exclusive appropriation may be resisted (*x*) ; but an appropriation, by means of mills or otherwise, for a temporary

(*q*) *Mason* v. *Hill* (1833), 5 B. & Ad. 1.

(*r*) *Wood* v. *Waud, supra; Aldred's Case* (1610), 9 Rep. 58 b.

(*s*) (1832—3), 3 B. & Ad. 306 ; 5 B. & Ad. 1.

(*t*) (1805), 6 East, 208.

(*u*) *Liggins* v. *Inge* (1831), 7 Bing. 682 ; *Mason* v. *Hill, supra.*

(*x*) *Saunders* v. *Newman* (1818), 1 B. & Ald. 258.

purpose, is not an appropriation if the water continues to descend to those below uninjured and undelayed (*y*) ; also, if the natural right is infringed, and there is no easement of water to justify the infringement, it is not necessary for the plaintiff to show special damage (*z*).

ARTIFICIAL WATERCOURSES, RIGHTS IN.

As regards an *artificial* watercourse,—An easement of water may, under certain circumstances, be acquired therein ; but, in the general case, no such easement will be acquired therein. In *Arkwright* v. *Gell* (*a*), where the artificial watercourse was a mineral sough or level called the Cromford Sough, which had been constructed previously to the year 1704, for draining certain lead mines in Derbyshire ; and the water from the level discharged itself into a stream called Bonsall Brook ; and it appeared, that the plaintiff became the lessee and subsequently the fee simple owner of the brook, and of the water issuing from the level, and also of a piece of land adjoining the brook ; and that subsequently the water ceased to run in the level, in consequence of another (and lower) level having been constructed by the defendants,—the court held, that the plaintiff had not acquired such a right to the water in the Cromford Sough as entitled him to maintain an action against the defendants,—Lord ABINGER saying :—The watercourse was artificial, made for a definite object, and the flow of water through it was of a temporary character ; and even a continuous user for twenty years, or longer, would afford no presumption of a grant of the right to the water in perpetuity,—*scil.*, because such a grant would oblige the mine-owner not to work his mines (by the ordinary mode of getting minerals) below the level drained by the sough, but to keep his mines flooded up to that level, in order to make the flow of water constant for the benefit of those who had used the original sough. Could it be supposed that the mine-owners meant to burthen themselves with such a servitude ? If a steam-engine were used by the owner of a mine to drain it, and the water pumped up flowed in some level to the estate of an adjoining landowner, who used it for agricultural purposes for twenty years, would it be possible, from such

Artificial watercourses, —user of water in, precarious,—

as against the owner of the watercourse.

(*y*) *Miner* v. *Gilmour* (1858), 12 Moore, P. C. C. 156 ; *Embrey* v. *Owen*, *supra* ; *Sampson* v. *Hoddinott* (1857), 26 L. J. C. P. 148.

(*z*) *Williams* v. *Morland* (1824), 2 B. & C. 910 ; *Embrey* v. *Owen*, *supra* ; *Bickett* v. *Morris*, *supra*.

(*a*) (1833), 5 Mee. & W. 203.

a user, to presume a grant by the owner of the steam-engine of the right to the water in perpetuity, so as to burthen himself and his assigns of the mine with the obligation to keep the steam-engine going for ever for the benefit of the landowner? Clearly not,—because any user, for however long a period, whilst the flow of water was going on for the convenience of the mines, would afford no presumption of a grant as against the owners of the mines; and a similar decision was arrived at, and for the like reasons, in *Wood* v. *Waud* (*b*).

But such user,—may be *as of right*, as against and amongst the adjoining landowners;

It rather appears, however, that when an artificial watercourse becomes (in effect) a natural watercourse,—as where the original purpose of the watercourse has ceased, and yet the watercourse continues,—riparian rights may be acquired in it,—both to the continued flow of the water and also to its continuing purity (*c*); and in *Gaved* v. *Martyn* (*d*), ERLE, C.J., appears to recognise this, although no rights had in fact been in that case acquired.

unless where the user is confessedly precarious.

In *Gaved* v. *Martyn* (*e*), there were certain clay-works, to which (or in respect of which) two rights of water were claimed,—the one in a clear watercourse, and the other in a foul watercourse, both watercourses being (more or less) artificial. The clear watercourse was in part supplied by natural streams, and in part by mine-water,—and as regards that, the court said the clay-works were (by long use) entitled to the use of the water so far as supplied by the natural streams, but not so far as regarded the mine-water. The foul watercourse, on the other hand, was supplied with water which all came from a brook, between which and the clay-works the owner of the clay-works had (by permission) cut a channel or course for the water,—and as regards that, the court said that the jury had rightly found the enjoyment to have been precarious and not *as of right*,—so that no right to this latter water had been acquired at all.

Artificial watercourse, —being and remaining artificial; and artificial watercourse, —becoming (in effect) a

According to *Arkwright* v. *Gell* (*f*), where water issues out of a mine,—by means of a sough (or channel) for the unwatering of a mine or in consequence of pumping operations within the mine,—and the water is of such abundance and continuance as to create an artificial watercourse, available for supplying motive power to (*e.g.*) a cotton-mill, the enjoyment of

(*b*) (1849), 3 Exch. 748.
(*c*) *Magor* v. *Chadwick* (1840), 11 Ad. & El. 571; *Sutcliffe* v. *Booth* (1863), 32 L. J. Q. B. 136.
(*d*) (1865), 19 C. B. 732; 34 L. J. C. P. 353.
(*e*) (1865), 14 W. R. 62; 19 C. B. (N.S.) 732; 34 L. J. (N.S.) C. P. 353. And see *Wood* v. *Waud* (1849), 3 Exch. 748.
(*f*) (1839), 5 Mee. & W. 203.

natural watercourse,—distinguished :

the water for the purposes of the cotton-mill is not *as of right* so far as regards (or as against) the owners of the mine ; and they are not bound to continue to supply the water, but are at liberty (by the construction, *e.g.*, of another sough at a lower level) to discontinue the supply of water to the original sough,—it being unreasonable to require them to maintain the mine-water at its former level in the mine ; and therefore neither by the common law, nor by the Prescription Act, 1832, can any grant be presumed or right (in the nature of a grant) arise to have the water maintained at such level (*g*),—the enjoyment of the watercourse being throughout precarious, *i.e.*, being liable to cease at any moment whenever the watercourse itself ceases to exist or to carry water. At the same time, it was observed in *Arkwright* v. *Gell*, that, *while the watercourse continued*, one owner adjoining the watercourse might, as against another adjoining owner higher up on the line of the watercourse acquire a right to the continued flow of the water, equally as if the watercourse was a natural stream (*h*). And in the case of *Wood* v. *Waud* (*i*), where there were two artificial watercourses both underground and both more than sixty years old ; and they had been originally constructed respectively for the purpose of draining two distinct mining properties, and they both flowed into a natural stream, considerably augmenting the quantity of the water therein ; and it appeared, that the water had been originally pumped from the mines into (but for over twenty years had found its way naturally into) the two watercourses, the water in each mine having risen to (and remained at) the level of the mouth (or mine-entrance) of the watercourse ; and the plaintiffs (who were worsted-spinners) had appropriated part of the water for their mills ; and the defendants (who were also worsted-spinners) were sued for retarding the course of the water,—which they did by intercepting it in (and collecting it from) the watercourses, retaining it for use at their mills, and then returning it (with little or no diminution) into the natural stream,—the court held, that the defendants were not liable for such interception of the water ; and in the judgment, the following observations (stating them in effect only) regarding artificial watercourses were made :—The question is one between the riparian owners *inter se*,—*i.e.*, between the owners along the

as regards the adjoining landowners *inter se*.

(*g*) See also *Magor* v. *Chadwick* (1840), 11 Ad. & El. 571 ; *Greatrex* v. *Hayward* (1853), 8 Exch. 291 ; *Wood* v. *Waud* (1849), 3 Exch. 748.

(*h*) See also *Gaved* v. *Martyn* (1865), 34 L. J. (N.S.) C. P. 353 ; *Ivimey* v. *Stocker* (1866), L. R. 1 Ch. App 396.

(*i*) (1849), 3 Exch. 748.

route of the watercourses ; *and it assumes that the watercourses are continuing in fact,—whether or not there would be any right against the respective mining owners to have the water continue in the watercourses.* The decision in *Arkwright* v. *Gell* (*k*) is correct, to the effect that no action lies for an injury occasioned by the diversion of an artificial watercourse, where the enjoyment is manifestly precarious, and where the diversion is the act of the mine-owner out of whose mine the water issues ; but where the enjoyment is not manifestly precarious but has been and is continuous, and the diversion is not by the mine-owner but is by the defendant as adjacent owner higher up the route of the watercourse, a different question arises : A watercourse, although artificial, may under the special circumstances have become (practically) a natural watercourse, and the wrongful diversion of the water in it would be equally actionable as the wrongful diversion of the water in a natural stream,—but, of course, a diversion (which would not be wrongful in the case of the natural stream) could not be wrongful in the case of an artificial stream,—and a mere temporary detention would not be wrongful in either case.

Water in artificial watercourse, —appropriation of.

Also, in *Beeston* v. *Weate* (*l*), where there was an ancient artificial channel by which the water of a brook was diverted for the purposes of irrigation ; and it appeared that the occupiers of a close adjoining that through which the artificial channel ran, had from time immemorial placed sods in the summer-time in the artificial channel, so as to divert the water down the channel into a pit on the adjoining close, where it was used for watering cattle,—the court held, that the artificial character of the watercourse did not prevent the acquisition of the right,—*scil.*, there being no evidence that the channel existed for a mere temporary purpose.

DAMAGES FOR INJURY TO WATER, WHERE SPECIALLY APPROPRIATED.

Damages,—for injury to water rights, —the amount of the damage increases, with any

In *Holker* v. *Porritt* (*m*), the plaintiff's predecessor in title had appropriated for the use of a farm on his estate and (as regards the overflow from the farm) for the use of his mill on the river J. the artificially divided half part of a natural stream, the other half part of which flowed into the river ; and he sold

(*k*) (1839), 5 Mee. & W. 231.
(*l*) (1856), 5 E. & B. 986 ; 25 L. J. Q.B. 115.
(*m*) (1875), L. R. 8 Exch. 107 ; L. R. 10 Exch. 59.

to the plaintiff the mill with all water rights, and with the right to construct goits on the other lands of the vendor and to take all the springs, wells, and streams of water there ; and the defendant obstructed the flow of the stream above the mill of the plaintiff and above the other lands of the plaintiff's vendor, —and for that obstruction the plaintiff brought this action ; and the court said, that the plaintiff was entitled for his own exclusive use to the whole of the divided half part of the stream which had been so appropriated as aforesaid, being in that particular in a more favourable position even than a riparian owner ; and that he was entitled to recover the damage sustained to his mill by the defendant's obstruction of the flow of the water,—although such damage was much greater than if no mill had been built, it being one of the necessary consequences of the appropriation of running water to a more beneficial use that the wrongdoer became subject thereby to a larger measure of liability (*n*).

special appropriation of the water.

RIPARIAN OWNERS, AND THEIR LICENSEES OF THE WATER.

Usually, it is only the riparian proprietor (and not the general public) who can complain of an interference with the enjoyment of rights of water (*o*) ; but the grantee or licensee of a riparian proprietor may also complain. Thus, in *Nuttall* v. *Bracewell* (*p*), the plaintiff was a riparian proprietor,—and also a mill-owner,—and he (and his predecessors in title) had for over sixty years taken about half the water of the stream for the use of the mill,—the water being taken by means of a goit inserted in the stream and conducted over the land of the riparian proprietor above (by license or grant of such latter proprietor) ; and the defendant was a riparian proprietor,—and also a mill-owner,—higher up the stream than where the goit was inserted, and he intercepted the water of the stream, so that it did not flow into and down the goit,—whereby the plaintiff lost the use of the water ; and the court held the plaintiff entitled to recover damages for such loss,—either as being a riparian owner in respect of the artificial watercourse (or goit), or as being the grantee of the riparian owner over whose land the goit was conducted, and in whose land also the goit was inserted in the stream.

Riparian owner,—may grant his water rights to another;

Rights of such grantee or licensee.

(*n*) (1832—3), *Mason* v. *Hill*, 5 B. & Ad. 1.

(*o*) *Insole* v. *James* (1856), 1 H. & N. 243 ; *Kensit* v. *Great Eastern Rail. Co.* (1884), 27 Ch. D. 122.

(*p*) (1866), L. R. 2 Exch. 1.

POLLUTION OF WATERCOURSES, NATURAL AND ARTIFICIAL.

The pollution of a watercourse, natural or artificial,—an injury,—

And equally in the case of an artificial watercourse as in the case of a natural watercourse, a man may not pollute the water, unless he have acquired the right to do so. Wherefore, in *Magor* v. *Chadwick* (*q*), where there was an adit which had been constructed for draining a copper mine in Cornwall, and the mine-water had continued to issue through the adit long after the mine workings had been discontinued ; and during the period of discontinuance, the water had become pure, and the plaintiff had used it for more than twenty years ; and thereafter the defendants (strangers to the original constructors of the adit) commenced getting other copper mines in the some district, and polluted the water issuing from the adit,—claiming a right to cause the pollution under an alleged custom, that "once an adit always an adit," as well for the original maker of the adit as for all others at any time mining in the district, but which custom the jury negatived,—the court held, that the defendants were not entitled (as against the plaintiff) to pollute the water coming from the adit,—although the original maker of the adit or any person claiming through him, upon a resumption of the workings in his copper mine, might possibly (and would probably) have been entitled to do so.

and actionable, without proof of damage.

In *Wood* v. *Waud* (*r*), where the plaintiffs were the owners of land and worsted mills situate on the banks of a natural stream, which was fed in part by the water from two artificial and underground watercourses originally constructed for draining certain mines ; and the defendants were landowners and worsted manufacturers higher up the stream ; and above the defendants' premises, there were also dye-works and other manufacturing works, all of which mills and dye-works and other works used (and polluted) the waters of the stream ; and it appeared that the defendants had not acquired any right (by long user or otherwise) to pollute the stream, but that the pollution which they added did not materially increase the already existing pollution of the water as it reached the plaintiff's mills,—the court held, that there was an injury to the plaintiffs' natural right to the purity of the water,—and seeing that the defendants' pollution, if it were permitted to continue for twenty years, would grow into a right in the defendants to pollute the stream,

(*q*) (1840), 11 Ad. & El. 571. (*r*) (1849), 3 Exch. 748.

the injury to the plaintiffs' right was actionable without proof of damage.

INJUNCTION, IN LIEU OF A SUCCESSION OF ACTIONS FOR DAMAGES, FOR POLLUTION.

Damages,—successively recoverable, for successive pollution.

In *Clowes* v. *Staffordshire Waterworks Co.* (*s*), which was an action for the wrongful pollution of a stream whereby the plaintiff (the owner of dye-works) sustained damage,—the court said, that the case was a proper one for an injunction to restrain the continued pollution, the legal remedy being only to bring a succession of actions,—in the first of which, nominal damages would be recovered ; and in the second of them, the actual damage sustained between the first and the second actions ; and in the third action, the actual damage sustained since the second action ; and so on,—which succession or series of actions was a great inconvenience.

Injunction,—in lieu of damages, where the damages inadequate.

In *Pennington* v. *Brinsop Hall Coal Co.* (*t*), where the plaintiffs were the owners of a cotton mill situate on the stream ; and they claimed, by prescription, the right to use the water of the stream for the purposes of their mill ; and the defendents were the owners of a colliery situate about two and a half miles higher up the stream, and pumped the water from their mine into the stream, and thereby polluted the water of the stream to such an extent that it injured the plaintiffs by corroding their machinery and depositing a scale in their boilers,—the court said, that an injury to light proceeded in most cases from a permanent structural obstruction, whereas an injury to water from pollution proceeded from a cause which varied from day to day ; that in the case of an injury to light damages might represent the depreciation in value of the property, while in the case of an injury to water caused by its pollution, the damages which would only cover the past injury, and would give no compensation for any future injury, were, in the general case, inadequate,—*scil.*, because the rights of the plaintiffs as riparian proprietors were not limited to their present modes of enjoyment, and a new mode of enjoyment would give a right to sue at once for the injury done in respect of the new user ; and therefore, even if there were no evidence of actual damage to the plaintiffs, but only evidence of injury to their rights, that injury would be sufficient to support their action.

(*s*) (1872), L. R. 8 Ch. App. 125. (*t*) (1877), 5 Ch. D. 769.

Neither injunction nor damage,—if no injury, in fact.

However, the injury must not be imaginary; and if the water be deprived of the noxious particles produced by previous deterioration, before it reaches the lands of the plaintiff, there is no ground for complaint (*u*); and although where the water is returned in a heated state, an action may be maintained for that injury (*x*), still if the natural temperature is restored before the water reaches the plaintiff, there will be no right of action.

PERCOLATING WATER, AND OTHER UNDERGROUND WATER.

Underground water,—withdrawal of.

A man may in the lawful use of his own land sink a well thereon deeper than his neighbour's well; and if, in consequence of his so doing, the neighbour's well is deprived of its supply, there is no wrong for which the neighbour may sue (*y*). So also a man intending to build on his land may (and naturally will) drain the land before building on it; and if, in consequence, his neighbour's house (built on land adjoining and not previously drained) subsides or cracks, there is no wrong for which the neighbour may sue (*z*). Similarly, if a man, in the lawful use of his own land, sinks therein, and collects the percolating water, —which water ceases thereupon to find its way into a stream, and the stream is dried, a riparian owner on the stream has no remedy (*a*).

Underground water,—pollution of.

On the other hand, if a man in the lawful use of his own land creates a pollution of the underground water therein, and the pollution percolates through into his neighbour's well (*b*), or percolates through into a cavern from which a defined stream of water issues (*c*),—the neighbour or the riparian owner is entitled to an injunction to restrain the continuance of the source of the pollution,—because, generally, if a man brings filth on his own land (*d*), he must take care that it does not escape on to his neighbour's land; and so for any other nuisance or dangerous thing which a man may lawfully create or bring on his own land (*e*).

(*u*) *Elmhirst* v. *Spencer* (1849), 2 Mac. & G. 45; *Wood* v. *Waud* (1849), 3 Exch. 748.

(*x*) *Mason* v. *Hill* (1832—3), 3 B. & Ad. 304; 5 B. & Ad. 1.

(*y*) *Acton* v. *Blundell* (1843), 12 Mee. & W. 324; 13 L. J. Exch. 289.

(*z*) *Popplewell* v. *Hodkinson* (1869), L. R. 4 Exch. 248,—discussed in *Jordeson* v. *Sutton Gas Co.*, [1899], 2 Ch. 217.

(*a*) *Chasemore* v. *Richards* (1889), 2 H. & N. 181; 7 H. L. Cas. 349.

(*b*) *Ballard* v. *Tomlinson* (1885), 29 Ch. D. 115.

(*c*) *Hodgkinson* v. *Ennor* (1863), 32 L. J. Q. B. 231.

(*d*) *Tenant* v. *Golding* (1704), Salk. 21, 360.

(*e*) *Rylands* v. *Fletcher* (1866), L. R. 1 Exch. 265; L. R. 3 H. L. Cas. 330.

SPRINGS OF WATER, HAVING DEFINED CHANNEL FROM THEIR SOURCE.

Spring with a defined channel,—a natural stream.

Where a natural spring assumes a defined channel immediately it rises to the surface, and runs along such channel into (and helps to supply the water in) a natural stream,—it is to be deemed part of the natural water of such stream, and may not be intercepted by a waterworks company,—not even where (as in *Dudden* v. *Clutton Union*) (*f*) they catch it before it issues at the surface ; nor, *semble*, may they sink a well for the purpose of causing the spring water to percolate into the well instead of issuing at its natural exit,—*scil.*, where (as in *Dickinson* v. *Grand Junction Canal Co.*) (*g*), they afterwards pump (and keep pumping) the water out of the well continuously for their own supply ; and apparently the circumstance that such spring water has a natural exit, is the circumstance which differences this class of cases from the cases of which *Acton* v. *Blundell* (*h*) is the best-known example.

Percolating water,—not a natural stream.

In *Acton* v. *Blundell* (*i*), the plaintiff had sunk and used a well for the supply of his mill ; the defendant had sunk a pit which dried the well ; the plaintiff had deepened his well, and so recovered the water supply ; the defendant had sunk another pit and also deepened his first pit, and the plaintiff's well was again dried up,—and the plaintiff claimed to stop the defendant from drying up his well ; but the court said that could not possibly be,—first, because the whole supply to the well was from undefined percolation ; and second, because the defendant was merely enjoying his own property in its natural state,—and the enormity of stopping the coal industry out of regard to the trumpery well of (it might be) a cottager could not be entertained.

The decision in *Acton* v. *Blundell*, *supra*, was applied in favour of a water company in *New River Co.* v. *Johnson* (*k*) (where a well fed by percolation was dried up by the water company's works) ; and the decision in *Dudden* v. *Clutton Union*, *supra*, was applied against the water company in *Wilts* v. *Swindon Waterworks* (*l*) (where springs issuing at the surface

(*f*) (1857), 1 H. & N. 629 ; followed in *Mostyn* v. *Atherton*, [1899] 2 Ch. 360.

(*g*) *Dickinson* v. *Grand Junction Canal Co.* (1852), 7 Exch. 282.

(*h*) (1843), 12 Mee. & W. 324.

(*i*) *Supra.*

(*k*) (1859), 29 L. J. M. C. 93.

(*l*) (1875), L. R. 9 Ch. App. 451 ; L. R. 7 H. L. 697.

and flowing along a channel into a stream were intercepted and collected by the water company in their reservoirs).

SPRINGS OF WATER, WITH NO DEFINED CHANNEL.

Spring of water, and overflow water, with no defined channel,—not a natural stream.

In *Broadbent* v. *Ramsbotham* (*m*), where there was a stream or spring of water issuing out of a hillside, and the water from which was received into a large basin or vat, and used for cattle-drinking ; and when (in wet seasons) the water was very abundant, the basin overflowed ; and the overflow water ran down a ditch beside a hedge, and thence (as to part) into a channel hollowed out by the action of the water, and (as to the rest) over swampy ground,—and after meandering over one or two fields, the overflow water formed a sort of definite channel, and thereby entered into, and in part supplied the water in, a natural stream,—the court held, that the defendant lawfully intercepted in the field in which the basin was and in his (the defendant's) adjoining field all such overflow water (and other water) from the hillside spring,—or that he lawfully diverted it from pursuing its devious (and in part meandering) way down into the natural stream. Also, in *Chasemore* v. *Richards* (*n*), the principle of the decision in *Broadbent* v. *Ramsbotham*, *supra*, was simply followed in the courts below, and was approved by the House of Lords,—Lord WENSLEYDALE pointing out, however, that *Dickinson* v. *Grand Junction Canal Co.*, *supra*, was also rightly decided on its own circumstances,—for, in the last-mentioned case, the water was a "spring" with a definite course from its commencement (*i.e.*, from the point at which it issued on the surface). And in *Rawstron* v. *Taylor* (*o*), also, there was no definite channel.

SALE OF WATER,—TITLE, WHEN BAD ; AND WHEN GOOD.

On sale of water rights,—title of vendor.

In *Wright* v. *Howard* (*p*), where the plaintiff agreed to sell (and the defendant to purchase) certain lands and reservoirs of the plaintiff, and also a certain weir which had been erected by the plaintiff in a river adjoining for diverting the water to his lands and reservoirs,—and the sale was a sale in fee simple ; but it appeared, that the right to interrupt the flow of the river,

(*m*) (1856), 11 Exch. 602.
(*n*) (1859), 2 H. & N. 168 ; 7 H. L. Cas. 349.
(*o*) (1855), 11 Exch. 369.
(*p*) (1823), 1 S. & S. 190.

either by penning it back on the proprietors above or by intercepting it from the proprietors below, had been acquired by the plaintiff,—as regards some of them, for a term of years only; and as regards the others of them, not at all,—the court said, there was an incurable defect in the title, the interception of the water (even without proof of damage) being a wrongful act as against the proprietors below, unless the right should have been acquired from them or against them. Also, in *Ennor* v. *Barwell* (*q*), which merely purported to follow *Wright* v. *Howard*, *supra*, the defendant was restrained from intercepting the water which rose at and from certain "*springs*" on his (the defendant's) land, and which springs had supplied (or been used to supply) the plaintiff's mines with water, the supply from the springs being copious and continuous, and the natural flow of the water from them (although in very ill-defined courses) being downwards towards the plaintiff's lands; but (on appeal) (*r*), the court said, that the action was one for a jury,—and it was impossible for the court to declare the legal rights of the parties on the evidence before it of the material circumstances; but the court apparently abstained from saying what were the material circumstances.

LAND-LOCKED UNDERGROUND WATER.

Underground water,—lying land-locked, letting loose of.

In *Bradford* (*Mayor*) v. *Pickles* (*s*), there were two surface "springs" which the plaintiff corporation had (as a water company) duly acquired from a previous water company (which latter company had acquired them from the owner of the lands in which the springs were situate); and it appeared, that the source from which the water which supplied the springs came was in the land of the defendant,—but that the water (while in defendant's land) was merely and wholly subterranean (or underground), cooped up between two faults and upon an impervious bottom, whereby it could find no exit save by the two surface springs in question,—and the court said, the defendant could not be prevented from dislodging the faults or breaking the impervious bottom, even although he should do so maliciously; but in fact he was doing it, in the ordinary and natural enjoyment of his own land.

(*q*) (1860), 2 Giff. 410; 3 L. T. (N.S.) 170.
(*r*) (1861), 4 L. T. (N.S.) 597.
(*s*) [1895] 1 Ch. 145; [1895] A. C. 587.

WATER GENERALLY,—INTERCEPTION, DISCHARGE, AND POLLUTION OF.

Easements in water,—to intercept; to discharge; and to pollute.

The right to pen back the water, so as to flood a neighbour above or to interfere with the natural flow of the water below, may be acquired by way of easement (*t*); and similarly, a right to pollute the water,—including (*e.g.*) a right to discharge water which has been used for the precipitation of minerals and so rendered noxious (*u*); also, a right to throw refuse from mines into a natural stream (*x*).

No right to the continued flow of water can be acquired in respect of water which merely percolates through in a casual manner, or which is mere overflow water (*y*); but if once the water has begun to run in a definite channel, any diversion of it (*z*), even where the channel is underground (*a*), is wrongful; and a right to require that the underground sources of supply even, shall not be interfered with, may arise,—under, *e.g.*, an express grant or covenant (*b*).

EXCESS IN USER OF EASEMENT OF WATER.

Easement to pollute,—what is, and what is not, an excess in the user.

Where the right to pollute water has been acquired by user, or otherwise, the right may not be exceeded; and the right is measured by the past user (when it has been acquired by user) (*c*), and otherwise by the terms of the express grant or agreement (when it has been acquired by grant or agreement). However, in *Baxendale* v. *M'Murray* (*d*), where the defendant (who was the owner of a paper-mill) had used to make his paper from rags, and while exercising that mode of manufacture had for more than twenty years discharged the refuse arising from the paper manufacture into a stream which ran past the

(*t*) *Miner* v. *Gilmour* (1858), 12 Moo. P. C. 156.

(*u*) *Wright* v. *Williams* (1836), 1 M. & W. 77; *Race* v. *Ward* (1857), 7 E. & B. 384; 26 L. J. Q. B. 133.

(*x*) *Carlyon* v. *Lovering* (1857), 1 H. & N. 784; 26 L. J. Exch. 251.

(*y*) *Broadbent* v. *Ramsbotham* (1856), 11 Exch. Rep. 602; 25 L. J. Exch. 115; *Chasemore* v. *Richards* (1859), 2 H. & N. 168; 26 L. J. Exch. 392; 7 H. L. Cas. 349; 29 L. J. Exch. 81; *The New River Company* v. *Johnson* (1859), 29 L. J. M. C. 93; *The Queen* v. *The Metropolitan Board of Works* (1863), 32 L. J. Q. B. 105.

(*z*) *Dudden* v. *The Guardians of Clutton Union* (1857), 26 L. J. Exch. 146.

(*a*) *Hodgkinson* v. *Ennor* (1863), 32 L. J. Q. B. 231; *Ennor* v. *Barwell* (1860), 2 Giff. 410.

(*b*) *Whitehead* v. *Parks* (1858), 2 H. & N. 870; 27 L. J. Exch. 169; *Lee* v. *Stevenson* (1858), 27 L. J. Q. B. 263; E. B. & E. 512; *Taylor* v. *St. Helen's Corporation* (1877), 6 Ch. D. 264.

(*c*) *Goldsmid* v. *Tunbridge Wells Improvement Commissioners* (1865), L. R. 1 Eq. 161; 1 Ch. App. 349; *Crossley* v. *Lightowler* (1866), L. R. 3 Eq. 279; 2 Ch. App. 476.

(*d*) (1867), L. R. 2 Ch. App. 790.

plaintiff's house ; and he subsequently introduced in lieu of rags a new vegetable fibre, and continued to carry on his works merely upon the same scale as before,—the court held, that the easement to which the defendant had become entitled was not a right to foul the stream by discharging into it the washings produced by the working up of rags, but was a right to discharge into it the washings produced by the manufacture of paper in the reasonable and proper course of such manufacture, using any proper materials for the purpose ; and that the onus of proving an increase in the pollution lay on the plaintiff.

WATER RIGHTS, WHERE ARISING BY GRANT.

Water rights, where dependent on a deed of grant.

Where the respective rights of adjoining owners (including adjoining vertical owners) as regards the subterranean water in their lands depends on the provisions of any deed or deeds, the provisions of the deeds are to be considered, and are paramount over (and, where inconsistent, displace) the right which the respective owners would (as regards the water) have enjoyed if there had been no such provisions (*e*).

Mutual rights of the riparian owners,—a question purely of construction.

Thus, in *Northam* v. *Hurley* (*f*), where it appeared that the plaintiff and the defendant were adjoining owners, and a stream flowed through defendant's close into plaintiff's close ; and the plaintiff and defendant agreed by deed, firstly, that the defendant should have all the water during the first ten days of every month, and secondly, that the plaintiff should at all other times have the control and use of the water,—and it was further agreed, that the water should be allowed to flow in a free and uninterrupted course towards and into plaintiff's close through a specified channel on defendant's close, and that the defendant should cleanse and repair that channel, and that (on his failure to do so) the plaintiff might do so,—the court said, that the deed, upon its true construction, operated to give the water easement to the plaintiff except during the first ten days of the month, and to give it to to the defendant during these first ten days ; and that the plaintiff (in respect of his easement) was entitled to a limited right in the channel,—*scil.*, to have it kept cleansed and repaired, and also unaltered ; and he could maintain an action for any injury to such limited right, without proof of any special damage from the injury.

(*e*) *Northam* v. *Hurley* (1853), 1 E. & Bl. 665.

(*f*) (1853), 1 E. & Bl. 665.

And in *Whitehead* v. *Parks* (*g*), where the plaintiff was the lessee (for bleaching purposes) of certain surface lands and of the streams and springs of water thereon and therein, and the defendant was the lessee (under the same lessor) of the coal within and under the land,—the defendant's lease being subsequent in date to the plaintiff's lease,—the court held, that the defendant could not, by his mining operations, lawfully interfere with the plaintiff's water rights; and it appearing that the springs were first contaminated, and afterwards dried up, by or in consequence of the defendant's mining operations, the defendant was held liable in damages.

"Springs and streams" of water,—construction of grant of.

In *Whitehead* v. *Parks* (*h*), in the demise to the plaintiff (or to his predecessor in title) of the surface lands and of the "*streams*" of water therein (or in certain specified parts thereof) there were excepted out of the demise (1) all mines minerals and quarries within the demised lands, and (2) "*all other streams of water*," with liberty to work and get the mines, and to alter or divert the course of any brook or spring of water; and the subsequent demise to the defendant was of all the said excepted mines and liberties; but the court said, that the demise to the plaintiff was of all the water in the specified parts of the lands demised, and that the defendant was liable,—*scil.*, because the common lessor could not derogate from the grant made by the first lease, and the diversion and contamination were a derogation from that grant; and if the common lessor could not do so, neither could the defendant. However, in *Taylor* v. *St. Helen's Corporation* (*i*), where the demise was of an existing watercourse, and of all the "*streams and springs*" of water flowing into or feeding the watercourse, the court did not think that the demise was of all the water, but only of so much as the watercourse thereby demised could carry,—and the defendant could not enlarge the capacity of such watercourse in order to carry more of the water.

"*Streams*,"—distinguished from "*springs*."

In *McNab* v. *Robertson* (*k*), the grant of water rights was a grant incident to the demise of a distillery, and was expressed to be of the "right to the water in the said ponds, and in the *streams* leading thereto,"—and there being "*streams*" (properly so called) which satisfied the words of the grant, the court held, that certain "*springs*" of water were not included, although the

(*g*) (1858), 2 H. & N. 870; 27 L. J. Exch. 169.
(*h*) *Supra*.
(*i*) (1877), 6 Ch. D. 264.
(*k*) [1897] A. C. 129.

water from such springs after welling up dispersed itself over the intervening land and percolated into the ponds; and in *Taylor* v. *St. Helen's Corporation* (*l*), where the grant was a grant incidental to a watercourse, and was expressed to be a grant of the several "*streams and springs flowing into or feeding*" the watercourse, and there were "*streams*" (properly so called) and also "*springs*" (properly so called) to satisfy the words of the grant, the court held, that *other water* was not included.

Springs and streams,—being mere collections of rain-water,—no easements in.

In *Ennor* v. *Barwell* (*m*), where certain "*springs*" or "*streams*" on the lands of the defendants (owners of the Chenten mines) were intercepted by the defendants, so that they ceased to reach the plaintiff (owner of the adjoining and rival Priddy mine), and the plaintiff thereupon lost the use of (or ceased to enjoy) the water for the washing of his ores; but it appeared, that the springs or streams were mere surface-springs or collections of rain-water; and there was no privity of title between the plaintiff and the defendants, or between their respective predecessors in title owners of the respective adjoining mines,—so that the right of the Priddy mine to use the water was a right wholly dependent on the actual past user,—the court did not think that the defendants' interception of the flow of the water was wrongful; and at any rate, it was for the plaintiff to show that it was wrongful, and he had not done so; and the defendant's conduct was, at the most, unneighbourly and spiteful.

Artificial sewer (or water-pipe), a distinct hereditament.

In *Lee* v. *Stevenson* (*n*), where the plaintiff demised to the defendant (with option of purchase) a piece of land for twenty-one years, excepting and reserving to himself (the lessor) and his heirs and assigns the power to enter and dig and make a covered sewer or watercourse through the demised premises in a defined direction to convey the waste water of his (the lessor's) adjoining premises into the river, the lessor his heirs and assigns paying to the defendant compensation for the exercise of the reserved right; and subsequently the plaintiff constructed the sewer, and paid the defendant the agreed compensation; and the defendant afterwards exercised the option to purchase,—and sometime after his purchase he inserted in plaintiff's sewer a communicating pipe, whereby he introduced his own water into plaintiff's sewer:—The court said, the sewer was for the plaintiff's

(*l*) (1877), 6 Ch. D. 264.
(*m*) (1860), 2 Giff. 410; 1 De G. F. & J. 529.
(*n*) (1858), 27 L. J. Q. B. 263.

use exclusively, and the defendant was not entitled to use it, and had committed a trespass in making the communication.

WATER RIGHTS, WHERE ARISING BY USER ONLY.

Water rights, acquired by user,—measure of.

Generally, every easement of water, when it has arisen by user, is measured by the past user; and when it arises under any express grant, it is measured by the words of the grant; and usually, the easement is acquired only for the land while it remains in its original character, and for purposes reasonably incident to the land while in that condition (*o*); but an alteration in the character of the land which does not materially increase the burden of the easement is permissible (*p*); and the water requirements of cottages, *e.g.*, may not, in fact, be greater than the water requirements of cattle-sheds (*q*).

Water rights, —excess in user of.

In *Crossley* v. *Lightowler* (*r*), where the defendants had by user acquired a right to foul a certain stream which flowed past the land of the plaintiffs, and it was alleged that they were exceeding the right so acquired,—the court admitted that the user in which the right had originated was also the measure of the right,—and held that any sensible enlargement of that user was wrongful,—*scil.*, by the person entitled to the right; but such person would not, *semble*, be exceeding his lawful right, merely because others also subsequently began to pollute the stream,—although, at the same time, the pollution by others would not justify him in enlarging his own user.

WATER RIGHTS, ABANDONMENT OF.

Abandonment or release,—what is, and what is not.

A prescriptive right (that is to say, a right acquired by user) to pollute a stream, may be abandoned or released,—and although a mere suspension of the user will not (being unattended by other circumstances) amount to an abandonment of the right (*s*), still if the suspension is long-continued or if the suspension should be attended with other circumstances all pointing to an intention to abandon the right, then the right will be deemed to have been abandoned,—the abandonment being, in all cases, a question of fact (*t*).

(*o*) *Wood* v. *Saunders* (1875), L. R. 10 Ch. App. 582.

(*p*) *Harvey* v. *Walters* (1873), L. R. 8 C. P. 162.

(*q*) *Watts* v. *Kelson* (1870), L. R. 6 Ch. App. 166.

(*r*) (1866), L. R. 3 Eq. 279; L. R. 2 Ch. App. 478.

(*s*) *Crossley* v. *Lightowler* (1867), L. R. 2 Ch. App. 478.

(*t*) *R* v. *Chorley* (1848), 12 Q. B. 515; *Crossley* v. *Lightowler*, *supra*.

WATER RIGHTS, IMPOSSIBLE ORIGIN OF.

Incapacity to grant—or to accept—an easement,—effect of.

Where a man has no perdurable estate in the alleged dominant tenement, he cannot by long user acquire for it an easement of water (or, in fact, any other easement) over the adjoining tenement,—for he is (in a manner) incapable of accepting the grant of the alleged easement; and conversely, where the owner of the alleged servient tenement is under a (statutory or other) incapacity of granting the alleged easement, no easement will be acquired against the servient tenement by long user. And in *Staffordshire Canal Co.* v. *Birmingham Canal Co.* (*u*), it was pointed out, that an easement against the defendant company, obliging them to allow to continue unreduced the flow of water (being a stream or overflow supply of water from their canal into the plaintiff's canal), was incapable of acquisition by long user under the Prescription Act (*x*),—by reason of the incapacity of the defendant company to make such a grant as (for the validity of the prescriptive title) would have been required to be implied,—the decision in this respect following *Rochdale Canal Co.* v. *Radcliffe* (*y*).

WATERCOURSES, REPAIR OF.

Duty of repair, rests, in general, on the dominant tenement;

The burthen of repair falls, by the common law, on the owner entitled to the easement (*z*); and such duty can only be thrown upon the servient tenement by special covenant or stipulation (*a*); and the duty of repair carries with it the incidental right of entry (*b*); and for neglect of the duty,—at least, in the case of an artificial structure,—he will be liable (*c*).

With right of entry, on servient tenement, to repair;

In *Hodyson* v. *Field* (*d*), the plaintiff and the defendant were respectively the owners of two adjoining pieces of woody ground adjoining a natural stream, and the defendant was also the owner of other land extending from his piece of ground, and he was proposing to work and get the coals under his piece of woody ground and other land,—and he obtained from the

(*u*) (1866), 35 L. J. Ch. 757; L. R. 1 H. L. 254.
(*x*) 2 & 3 Will. 4, c. 71.
(*y*) (1852), 18 Q. B. 287.
(*z*) Bract. lib. 4, fo. 222; *Pomfret* v. *Ricroft* (1669), 1 Saund. 322 a; *Taylor* v. *Whitehead* (1791), 2 Doug. 745.
(*a*) 2 Inst. 701; *Spencer's Case* 1582), 5 Rep. 16: *Rider* v. *Smith* 1790), 3 T. R. 766; *Mayor of Congleton* v. *Pattison* (1808), 10 East, 135; *Sampson* v. *Easterby* (1829), 9 B. & C. 505; 1 Cr. & J. 105; *Taylor* v. *Whitehead*, *supra*; and *Pomfret* v. *Ricroft*, *supra*.
(*b*) Rep. 9 Edw. 4, 35; *Pomfret* v. *Ricroft*, *supra*; *Liford's Case* (1615), 11 Rep. 52 a.
(*c*) *Bullard* v. *Harrison* (1815), 4 M. & S. 387; Gale on Easements, 322.
(*d*) (1806), 7 East, 613.

plaintiff the grant of a liberty to construct a sough (or drain) from plaintiff's woody ground into defendant's woody ground, for the purposes of his *intended* colliery (*scil.*, for the unwatering thereof); and it appeared that the sough was constructed accordingly, and was used for the purposes of the colliery, and that (before the coal was fully worked out, and while the colliery was still in full working) the sough wanted repairing, and the defendant entered on plaintiff's piece of woody ground and repaired the sough,—for which entry the plaintiff sued him in trespass, alleging that the liberty to construct the sough did not extend to afterwards repairing it; but the court held, that the repair was incident to the grant, citing 2 Roll. Abr. 567 and 9 Edw. 4, 35; and that the defendant might enter and repair *toties quoties* the sough wanted repair,—*scil.*, while and so long as the colliery was not exhausted.

And even to re-open, after a temporary intermission.

Also, in *Whaley* v. *Laing* (*e*), where the plaintiff was seised of a piece of woody ground, and the defendant was seised of another piece of woody ground adjoining, and of thirty-five acres of land also adjoining and of the coal beneath; and it appeared, that a predecessor in title of the plaintiff had granted to a predecessor in title of the defendant the right or liberty of constructing a level for the use of his *intended colliery*,—which level had been duly constructed, and afterwards used and kept in repair; and afterwards, the use of the level was intermitted for a considerable time, and the defendant then resumed working the colliery, and claimed to reopen the level,—the court held, that he was entitled to do so, under the old liberty.

Duty to repair,—neglect of, damages for.

In *Buckley Limited* v. *Buckley* (*f*), where there was a goit (or artificial watercourse) used for the common benefit of the plaintiff company and of the defendant,—the lands of both having originally belonged to one common owner (C. C.), who had constructed the goit; and the water in the goit was taken from the river, by means of a sluice in the river at the point where the goit communicated with the river,—and which sluice (together with a shuttle for regulating the quantity of the water) had also been constructed by C. C.; and it appeared, that, on the sale by C. C. to the plaintiff company (*i.e.*, to the predecessors in title of the plaintiff company) of the land owned by the plaintiff company, the goit (where and so far as it traversed that land) had been excepted out of the conveyance, with the right to enter and

(*e*) (1857), 26 L. J. Exch. 327; 27 L. J. Exch. 422.

(*f*) [1898] 2 Q. B. 608.

repair the goit; and the defendant's land was subsequently conveyed, together with the goit, to the defendant (*i.e.*, to the defendant's predecessor in title); and after such division of the lands, the defendant neglected to repair the shuttle to the sluice,—and a heavy flood supervening, the shuttle was carried away, and the water rushing into the goit without any regulation as to its quantity, overflowed upon the plaintiff's land, and did great damage there,—the court held, that the defendant was liable, for not repairing the shuttle, although the plaintiff (it was suggested) might also have repaired it for the better enjoyment of his own right to the use of the water of the goit (*g*),—*scil.*, because C. C.'s original obligation to repair the goit (together with the sluice and shuttle), for the protection of the lands of the plaintiff's predecessors in title, was not abrogated by the plaintiffs subsequently acquiring a right to the use of the water in the goit in common with the defendant.

WATERCOURSE, EXPIRATION OF RIGHT TO.

Watercourse, —user of, under an agreement; right to, determines with expiration of agreement.

Where the plaintiffs had a colliery lease from the defendants with surface rights; and they afterwards acquired also the lease of an adjoining colliery from other lessors, and subsequently purchased the fee simple reversion on the last-mentioned lease; and, during the period of the first lease, they constructed on the surface lands of that lessor an artificial watercourse or channel whereby they conducted to their secondly acquired colliery certain overflow water on such surface lands, and afterwards enjoyed such watercourse until the expiration of their first lease,—the court said, that the watercourse was either constructed under the surface powers contained in the first lease, or else was constructed under the belief or upon the assumption (shared in by both lessor and lessee) that these powers did authorise its construction; and therefore the enjoyment of the watercourse ended with the first lease, although it had been then enjoyed for more than twenty years (*h*).

(*g*) *Pomfret* v. *Ricroft* (1669), 1 Wms. Saund. 321.

(*h*) *Chamber Colliery* v. *Hopwood* (1886), 32 Ch. D. 549.

CHAPTER XIII.

ON INJURIES TO MINES,—AND ON INJURIES BY MINING OPERATIONS.

SECTION I.—*On Injuries to the Right of Support, and on the Compensation therefor.*

(i.) Subjacent support,—Natural rights and easements in connection therewith.

Subjacent support,—a natural right.

THE owner of the surface of land in its natural state is entitled to support from the subjacent strata, and that not as an easement or right depending on any grant but as a natural right incident to his property in the surface ; and this right of the surface owner has been likened to that of an owner of the upper story of a house, who holds his tenement with an implied right of support from the lower story.

Subjacent support,—easement to withdraw.

The legal presumption of the natural right of support may, of course, be repelled by evidence to the contrary (*a*) ; but the burden of proof lies on those who allege the contrary, and the burden is one not easy to discharge (*b*). However, if any mine-owner can show either by documentary evidence (*c*), or by notorious usage (*d*), that he is entitled to work his mines without leaving support to the surface, this claim,—however unreasonable it may at first sight appear,—will be allowed to prevail.

COMMON LAW RIGHT OF SUPPORT.

Subjacent support,—right of, where title on the original severance not shown.

In *Humphries* v. *Brogden* (*e*), where the plaintiff was the (copyhold) owner of the surface, and the defendants were the lessees of the subjacent coal mines under the Bishop of Durham, —and the title on the first severance of the surface and minerals did not appear, so that the question of support was merely one of the common law right of the surface owner ; and the jury

(*a*) *Rowbotham* v. *Wilson* (1860), 3 H. L. Cas. 348 ; *Aspden* v. *Seddon* (1875), L. R. 10 Ch. App. 394.

(*b*) *Smith* v. *Darby* (1872), L. R. 7 Q. B. 716.

(*c*) *Buchanan* v. *Andrews* (1873), L. R. 2 H. L. Sc. 286.

(*d*) *Att.-Gen.* v. *Conduit Co.*, [1895] 1 Q. B. 301.

(*e*) (1850), 12 Q. B. 739.

found that the defendants had caused a subsidence of the surface, notwithstanding that they had worked carefully and according to the custom of the country,—the court held, that the defendants were liable on that verdict (and notwithstanding that verdict) for the subsidence damage,—and the common law right to support was expressed as follows :—The owner of the surface is entitled to have it supported by the subjacent mineral strata ; and if the surface subsides through the removal of such subjacent strata, although the operation may not be negligent nor contrary to the usual and customary mode of working, yet the owner of the surface may maintain an action for the damage ; and reasonable support is simply what will support the surface.

Subjacent support,—right of, where title on the original severance is shown.

But when the terms of the original severance of the surface and of the mines are known,—as where the instrument occasioning the severance is produced,—it is then a question of the construction of that instrument. And accordingly, in *Harris* v. *Ryding* (*f*), where the defendants were the owners of the subjacent mines, and the plaintiff was the owner of the surface and of two dwelling-houses built thereon, and he sued for an injury by subsidence ; and it appeared, that, on the original severance of the mines from the surface,—on the sale of the surface, there was contained in the purchase deed an exception of all the mines and minerals, with a right to work and get them, paying compensation for any injury to the surface occasioned by the working ; and it also appeared, that the two dwelling-houses had been built subsequently to the severance,—the court said, that the exception entitled the mine-owners to get so much only of the mines as they could get consistently with leaving support to the surface.

CASES IN WHICH RIGHT OF SUPPORT HELD TO CONTINUE.

No right of subsidence,—(1) Where the surface and minerals are held in fee simple,—in severalty.

In *Smart* v. *Morton* (*g*), where in an indenture of 1671 the coal mines had been excepted with full power to work them and with way-leave rights and other surface rights, the grantor covenanting for payment of treble the damage which the grantee should sustain by the working of the mines ; and subsequently the mines were worked without leaving sufficient support, and the land subsided, and the houses thereon cracked;

(*f*) (1857), 3 K. & J. 695.

(*g*) (1855), 24 L. J. Q. B. 260 ; 5 E. & B. 30.

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and it appeared, that the mines had been worked properly and according to the course and practice of mining used and approved of in the locality; and the defendants were ready and willing to pay damages according to the covenant of the grantor,—the court said, that the covenant to pay compensation referred only to the surface damage and not to the damage caused by the subsidence,—which last-mentioned damage the parties were entitled to recover by common law and as damages properly so called: and all the powers of getting and working the mines reserved in the deed were reserved *subject to the implied right of the owner of the surface to support from the minerals.*

(2) Where the mines are in lease only.

In *Dugdale* v. *Robertson* (*h*) there was a demise of mines, and such demise had become vested in the defendant; and the plaintiff (who was the lessor) claimed that the liberties granted by the lease did not extend to causing a subsidence; and the court finding the liberties thereby granted to be capable of being satisfied without any right of subsidence being included therein, held that they must be so satisfied, and that the plaintiff was therefore entitled to an injunction against causing or permitting a subsidence. And the court said, that in so interpreting the lease, it was merely following the principle of the decision in *Smart* v. *Morton* (*i*), which had merely followed the principle of the decision in *Harris* v. *Riding* (*k*); but, in fact, *Harris* v. *Riding* was the case of an exception of the mines in fee simple on a sale of the surface lands in fee simple; and *Smart* v. *Morton* was the like case; but in neither case was a right of subsidence shown to be given, the liberties being in each case mere surface liberties, subject to paying compensation for the land injured by the exercise of such surface liberties.

(3) Where the severance of the minerals, was on an enfranchisement.

And so also, in *Hext* v. *Gill* (*l*), where there had been an enfranchisement of certain copyhold hereditaments; and the lord of the manor had reserved to himself (in the enfranchisement deed) all mines and minerals within and under the premises, with full and free liberty of ingress, egress, and regress, to dig and search for and to take, use, and work, the excepted mines and minerals; *and the deed contained no provision for compensation*; and under the enfranchised tenement there was a bed of china clay, the existence of which was not known to either of the parties at the time of the enfranchisement, no china clay

(*h*) (1857), 3 K. & J. 695.
(*i*) (1855), 5 El. & Bl. 30.
(*k*) (1839), 5 Mee. & W. 60.
(*l*) (1872), L. R. 7 Ch. App. 699.

having ever theretofore been gotten in the locality; and it appeared, that the china clay could not be gotten without totally destroying the surface; and the owner of the surface brought this action to restrain the owner of the minerals from getting the china clay,—the court held, that the china clay was indeed included in the exception of mines and minerals; but that the owner of the minerals was not entitled to get it, *in such a way as to destroy the surface*; and the court said, that where a landowner sells the surface, reserving to himself the minerals with power to get them, he ought (if he intends to get them in a way which will subside the surface) *to so frame the reservation of the liberty as to clearly show that he is intended to have that power.*

(4) Where the severance of the mines,—was on an inclosure.

In *Blackett* v. *Bradley* (*m*), where, by the Inclosure Act, all the previous rights of the lord as to the mines were reserved to him without any liability on his part to pay compensation for damage,—the bargain being that compensation for any injury to the allotments should be made by the occupiers of the allotments, *inter se*,—the court held, that the lord (or his lessees of the minerals) had not any right to subside the surface. And in *Roberts* v. *Haines* (*n*), where the Inclosure Act reserved the mines to the lord, with full power to enter and get them, paying compensation for damage; and it was specifically provided, that the lord should not carry on any work on the surface within forty yards of any dwelling-house, nor get any of the mines under any dwelling-house or within forty yards therefrom; and it appeared, that the mines had been worked in a proper manner, and had not come within the prohibited distance, but that the workings had nevertheless occasioned a subsidence,—the court held the defendants liable, saying that the absolute prohibition against working within the prescribed distance did not confer any right to cause a subsidence by the workings outside that distance.

CASES IN WHICH LIMITED RIGHT OF SUPPORT ONLY.

Support from pillars of coal,—and no general right of support,—stipulated for.

In *Eadon* v. *Jeffcock* (*o*), there was a demise in 1840 of one seam of coal, at a minimum rent and at an acreage rent beyond, and certain specified pillars were required to be left for the support of the surface and of the buildings thereon; and

(*m*) (1862), 1 B. & S. 140; 31 L. J. Q. B. 65.

(*n*) (1856), 6 E. & B. 643.

(*o*) (1872), L. R. 7 Exch. 379.

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that demise became vested in the defendant; and subsequently to the lease, the lessor sold and conveyed portion of the surface land to the predecessors in title of the plaintiff, subject to the lease of 1840, and reserving the mines with power to work, paying compensation for any use of the surface, but exempt from any payment for damage through subsidence; and the plaintiff's land having subsided by reason of the lawful workings of the defendant,—The court held, that the defendant was not liable; the required pillars having been left, and the workings of the seam having been proper in all respects,—*scil.*, because the lessor (who was, at the time, the owner of both surface and minerals) had, in effect, sold the minerals, reserving only the specified pillars,—and had also given up his right of support, save so far as the pillars sufficed for the support; and the plaintiff claiming under him, and with full notice of the defendant's lease, was in no better position than the original lessor, and had purchased the surface with only the specified right of support, and with no other right of support.

CUSTOM,—OR USAGE,—NOT SUFFICIENT TO GIVE RIGHT OF SUBSIDENCE.

No right of subsidence,—(1) By custom merely;

In *Hilton* v. *Lord Granville* (*p*), it was held, that a claim put forward by the lord of a manor to work mines under any messuages or buildings held of the manor, and so as to subside the foundations thereof, and without paying any compensation for the damage so occasioned, was a claim which no alleged custom of the manor could support,—*scil.*, because the custom (regarded as a custom) was unreasonable and therefore void.

or (2) by usage merely.

Where the plaintiff was lessee of the surface subject to a reservation of mines and of mining rights, and which rights (on their true construction) were held not to entitle the mine-owner to cause a subsidence of the surface, but only to entitle him to exercise other surface rights, paying compensation therefor,—and the defendant was the lessee (or grantee) of the reserved mines and mining rights,—and in working the mines, the defendant occasioned a subsidence of the plaintiff's surface,—the court held the plaintiff entitled to recover the damage (*q*),—and the plaintiff might, in such a case, have also had an injunction against the continued wrongful working, *even although such*

(*p*) (1845), 5 Q. B. 701.

(*q*) *Treharne* v. *Davis* (1881), *Davis* v. *Treharne* (1881), 6 App. Cas. 460.

working was according to the custom of the country where the mines were; for such custom did not (and could not) affect the plaintiff's right of support, the reservation itself not having deprived him of such right.

SUBSIDENCE, IN RELATION TO PUBLIC ROADS.

General right of subsidence,—none in case of public roads.

Where an Inclosure Act reserved the mines to the lord, with full power to work and without paying any compensation for any subsidence damage or other damage to the surface occasioned by the workings; and the Act (or the award thereunder) at the same time set out certain public roads,—the court said, that the provisions as to working paying for the damage were not applicable to (or so as to justify any interference with) the public right of way,—or, in other words, that these provisions were to be read as subject to the public rights of road (*r*),—a decision which (or the principle of which) was afterwards held applicable,—or at all events assumed to be applicable,—to a public road existing at the date of (and continued by) the award (*s*).

CASES IN WHICH RIGHT OF SUPPORT HELD NOT TO CONTINUE.

Right of subsidence,—under grant, express or implied:

At the same time, the right to cause a subsidence of the surface together with the buildings thereon, and without any liability to pay compensation, may arise by express grant (*t*), and even by prescription or implied grant (*u*); and it matters not for this purpose, whether the instrument of severance (whereby the surface lands and the mines first came to be held in several ownership) is a deed, a will, an Inclosure Act (or other Act), or other document whatsoever. Thus, in *Rowbotham* v. *Wilson* (*x*), where, by the award made pursuant to the provisions of an Inclosure Act, a certain part of the surface had been allotted to one, and the minerals underneath it to another; and the award prescribed, that the minerals might be worked without any liability *on account of the surface being rendered uneven by sinking in hollows*, or by being otherwise defaced or injured; and certain houses were afterwards built on the land, and had

(1) Under an Inclosure Act,—

(*a*) Without any liability to pay compensation for the damage;

(*r*) *Benfieldside Local Board* v. *Consett* (1877), 3 Ex. D. 54.

(*s*) *Att.-Gen.* v. *Conduit Colliery Co.*, [1895] 1 Q. B. 301.

(*t*) *Buchanan* v. *Andrews* (1873), L. R. 2 H. L. Sc. 286.

(*u*) *Rowbotham* v. *Wilson* (1860), 8 H. L. Cas. 348.

(*x*) (1857), 8 El. & Bl. 157; 8 H. L. Cas. 348.

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stood for more than twenty years, and they then subsided through the working of the mines ; and it appeared, that the mines had been worked with due care and according to the usual practice of working in the locality,—the court said, that the owner of the surface could not sue for the damage, the provisions of the award excluding that right,—where the mines had been worked without any negligence and according to the mining usage of the locality.

(*b*) Subject to the liability of paying compensation.

Also, in *Wakefield* v. *Buccleuch* (*Duke*) (*y*), where the reservation to the lord contained in the Inclosure Act was a reservation of all mines, beds, seams, and veins of coal, lead, copper, tin, and iron, and other mines and minerals whatsoever, and of all quarries of stone, slate, and flags, and other quarries whatsoever, upon, within, or under the said lands and grounds to be divided and inclosed, with full power to enter on the said lands or any part thereof to search for, bore, and dig for coal, etc., and all other minerals, etc., and to sink shafts and veins in or upon the lands, and to land such coal, etc., and to lay and deposit the same on the lands, and to continue the same there, and to take away the same in any manner whatever, "through or over the said lands, or any other of the customary lands within or holden of the said manor," and for that purpose to open gaps in the fences, and to make roads when and so often as he might think proper, and to "sink and drive such and so many pits, quarries, levels, soughs, saflights, tunnels, saights, and other necessary works within or upon the said lands," as he might think proper for getting the minerals, and to set up houses for workmen and buildings for smelting, etc., "*in as full and ample a manner to all intents and purposes as could have been done if the said lands had remained open and uninclosed*, making reasonable compensation, nevertheless, for damages done by such works as aforesaid to the persons sustaining such damage,"—the court held, that under these words the lord was entitled to the mines under the lands, and to work such mines to an extent which might reach to the utter destruction of the land above, subject only to the liability to pay compensation for the damage done.

PRINCIPLE OR CANON OF CONSTRUCTION,—AS REGARDS SUBSIDENCE, RIGHT OF.

Canon for the construction of express

In *Smith* v. *Darby* (*z*), where the plaintiff sued for a subsidence whereby his mill and other buildings had given away ;

(*y*) (1870), L. R. 4 H. L. 377. (*z*) (1872), L. R. 7 Q. B. 716.

grants,—no right of subsidence, if the liberties can be referred to surface damage of any other sort:

(1) In case of a lease of the mines;

and the pleading in defence was, that the plaintiff's predecessors in title, being seised in fee of the land, etc., and of the subjacent mines, by an indenture of lease demised the mines with full power to the lessees and their tenants to get the minerals,—making reasonable satisfaction to the lessor and his tenants for the damage to be done to them respectively, by the surface of the lands being covered with rubbish or otherwise injured, or as he or they might sustain as well by the injury done to the lands in sinking and getting the mines and minerals *as for such damage or injury as might be done or caused to the dwelling-houses or other buildings of the lessor, by getting the minerals under or near to any of the dwelling-houses or other buildings* according to the covenant thereinafter contained for that purpose,—(to wit), in case any damage or injury during the term thereby granted should happen to any of the dwelling-houses, cottages, or other buildings already erected, or to be thereafter erected on the land in lieu of the present buildings, and not of greater value than the present buildings were when erected, *by reason of any minerals being got under them, or so near to them as to occasion such damage or injury*,—the lessees and their assigns should at their own cost, on six days' notice by the lessor or his assigns, or tenants, rebuild or repair any such buildings so damaged and injured, and put them in as good condition and repair as they were before the damage was done; and further, that the lessees and their assigns should every year during the term pay to the lessor, besides the immediate damage to be paid to the tenant, at the rate of 40*s.* an acre for the damage done to the crops, etc., for the first five years, and such a price as arbitrators should determine as rent for each acre that should be damaged, —after which the lessees were to have the free use of the land during the residue of the term,—the plea concluding with an allegation that the defendants were the assignees of the lease, and had always been ready and willing to pay the compensation, —the court held, that the plea was good, for that the terms of the lease sufficiently showed that the lessees of the mines were to have the right to work the mines so as to undermine the surface, subject only to paying damages according to the covenant,—LUSH, J., observing :—

"I take it to be well established by the cases, that a grant of all the minerals under certain lands, without more, must be read, not as meaning a grant of all the minerals that may be found under those lands, but of all the minerals that can be taken

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away from under those lands without disturbing the surface; and if to that grant be superadded provisions for compensation for damage done to the surface, and the words giving compensation can be fairly satisfied by reference to acts done on the surface, though they may be large enough to extend to damage done to the surface by taking away the support, still they must be read as confined to acts done on the surface, the presumption being that the grantor did not intend to enable the grantee of the minerals to take away the support from the surface soil. And if the words of this lease had contained only phrases of that description *capable of being satisfied by reference to acts done on the surface*, I should have agreed that they did not confer power on the lessees to take away the minerals without leaving support under the surface soil; but the words are not capable of being so satisfied, the intention having clearly been to enable the grantee to take away all the minerals though the effect might be to let down the surface."

(2) In case of a fee simple exception of the mines,—

And similarly, in *Aspden* v. *Seddon* (*a*), where the indenture by which the surface was severed from the mines excepted the mines in the following words:—

"Except and always reserved out of these presents, and the direction, appointment, grant, and conveyance hereby made, unto the *grantor*, his appointees, heirs, and assigns, all mines, veins, and seams of coal, cannel, and ironstone, and other mines and minerals, lying within or under the said piece of land hereby appointed, granted, and conveyed, or any part or parts thereof respectively, with full liberty, power, and authority for the *grantor*, his appointees, heirs, and assigns, and his, their, or any of their lessees, agents, and workmen, and every or any other person or persons, by his, their or any of their order or permission, at any time or times, or from time to time, to search for, get, win, take, cart, and carry away the same, and sell or convert to his or their own use, the said excepted mines, veins, and seams of coal, cannel, and ironstone, and other mines and minerals, or any of them, or any part or parts thereof, at pleasure, and to do all things necessary for effectuating all or any of the aforesaid purposes,—*but without entering upon the surface of the said premises, or any part thereof, and so that compensation in money be made by him or them for all damage that shall be done to the erections on the said plot by the exercise of any of the said excepted liberties, or in consequence thereof*":

(*a*) Where liability to pay compensation for the subsidence damage;

(*a*) (1875), L. R. 10 Ch. App. 394.

And by the indenture, the grantee of the surface was bound to erect and at all times thereafter to maintain upon the land a mill and premises of defined dimensions, paying a chief rent of 72*l.* 3*s.* 2*d.* to the grantor; and it appeared, that the grantor remained owner of certain adjoining land and of the mines thereunder, and that subsequently the excepted mines and mining rights (together with the adjoining lands and the mines thereunder) became vested in the defendants, who (it was alleged) had occasioned a subsidence of the land and very serious damage to the mill and premises, in consequence of their mining operations in the subjacent and adjacent strata,—the court held, that the defendants could not be restrained from working the mines, so as to cause a subsidence, MELLISH, L.J., saying :—

"It is clear, that as the land was conveyed for the express purpose that a cotton mill and other buildings might be erected on it and for ever thereafter kept in repair as a security for the rent-charge reserved thereout, there was *primâ facie* the grant of a right to have not only the surface of the land in its natural state but the buildings to be erected thereon supported by the subjacent and adjacent minerals. Still it is equally clear, that this *primâ facie* inference may be rebutted; and that if it appears from any express words in the deed or by necessary intendment from anything contained in the deed, that it was not the intention of the parties that there should be any right to support, the court is bound to hold that the plaintiffs have failed to make out their case. For, as laid down in *Rowbotham* v. *Wilson* (*b*), the rights of the grantor in the minerals must depend upon the terms of the deed by which they are reserved when the surface is conveyed; and the words of the exception in the present case do certainly appear in very plain terms to give power to the mineral owner to remove any part of the minerals at his pleasure. But we think that these words are not by themselves sufficient to take away the surface owner's right to support; and if the sentence had stopped there, these words would have been consistent with the construction that the mineral owner may take away every part of the minerals, provided he can do so without violating the surface owner's right to support, but not otherwise; and some further words would have been necessary, to prove that the intention of the parties was that the mineral owner should be at liberty to take away the whole or any part of the minerals, notwithstanding he might thereby let

(*b*) (1860), 8 H. L. Cas. 348.

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down the surface or any buildings thereon. But there being added the words, "*but without entering upon the surface of the said premises*, or any part thereof, and so that compensation in money be made by him or them for all damage that shall be done to the erections on the said plot by the exercise of any of the said excepted liberties or in consequence thereof,"—and these words expressing that the mine-owner in working the mines is not to enter upon the plot of land conveyed by the deed, the damage to the buildings for which the compensation is to be paid must be damage to the buildings caused by the removal of the minerals reserved; and therefore it follows, that a right to remove all the minerals, notwithstanding the buildings above might be thereby damaged, was one of the liberties reserved by the deed,—the plain meaning of the whole reservation being, that the mine-owner is to be at liberty to remove the whole or any part of the minerals at his pleasure, paying compensation to the surface owner for any damage which may be thereby occasioned to the buildings of the surface owner; and that is equivalent to saying, that he may remove the whole of the minerals, notwithstanding the buildings may be thereby damaged, subject to a liability to pay compensation."

and (*b*) where no liability to pay compensation.

Similarly, in *Buchanan* v. *Andrew* (*c*), where a feu (*i.e.*, lease) of land was granted reserving the subjacent minerals, and stipulating that the feuar (*i.e.*, lessee) should have no claim against the superior (*i.e.*, landlord) or his tenants (lessees of the minerals) in respect of any damage that might arise from the working of the minerals,—the court held, that the lessee had, by the terms of his contract, on the plain construction thereof, granted to the landlord and his lessees a right to occasion damage by subsidence; and it made no difference for that purpose, that the lessee was bound by his lease to erect and for ever thereafter to maintain a dwelling-house of a defined character on the land,—although that circumstance made the contract a more improvident one.

Where no right of subsidence,—injunction will issue, however much it may render the mines unprofitable.

Where the mines under certain lands were sold, with a right to get them, and with large rights over the surface subject to paying compensation for any damage to the surface or to the buildings thereon; but the surface-rights did not, on their true construction, extend to authorising a subsidence of the surface, if that should happen in the ordinary course of working the

(*c*) (1873), L. R. 2 H. L. Sc. 286.

mines,—the court granted an injunction against working so as to occasion a subsidence, although (as the mine-owner alleged) the injunction would, in all probability, render the mines unworkable to a profit (*cc*).

FREEHOLD TITLES,—HOW AFFECTED BY RIGHT OF SUBSIDENCE.

No injunction,—where subsidence rightful.

When the court finds in the instrument of severance, that among the rights of working and getting the excepted mines there is included a right to occasion a subsidence (in case a subsidence should happen in the course of the proper working of the seams), and compensation is provided for the damage occasioned by the subsidence,—any surface-owner who purchases subsequently to the severance will be bound by those provisions, and will be entitled to compensation only, but not to support (*d*) ; and he will therefore not be entitled to any injunction against the mining lessee or mine-owner (*e*) to stay the further subsidence ; but will be entitled only to compensation for the subsidence (*f*),—the subsidence being (in such a case) rightful, subject to the condition of paying the agreed compensation.

Right of subsidence,—is a defect in the title to the surface.

In *Shafto* v. *Johnson* (*g*), the owner of the surface (and of the mines) had granted a lease of the mines with certain liberties of working, and had afterwards died, having by his will devised the lands (including the reversion on the mining lease) to the plaintiffs ; and the plaintiffs sued the defendant to restrain him from so exercising the mining liberties as to cause any subsidence of the surface ; but it appeared to the court, that certain parts only of the surface (and of the buildings thereon) were protected by the lease against subsidence ; and the action (which related only to the unprotected parts) was therefore dismissed. And in the subsequent case of *Taylor* v. *Shafto* (*h*), where the plaintiff was a sub-purchaser of portion of the surface lands so unprotected as aforesaid (and had acquired title under A., who had purchased from the devisees aforesaid of the original lessor) ; and it appeared, that in A.'s purchase deed the devisees as vendors had covenanted, (1) that A. his heirs and

(*cc*) *Westmorland* v. *New Sharlston Co.*, W. N. (99) pp. 2, 88.
(*d*) *Smith* v. *Darby* (1872), L. R. 7 Q. B. 716.
(*e*) (1875), L. R. 10 Ch. App. 394.
(*f*) (1876), 1 Ex. D. 496.
(*g*) (1863), 8 B. & S. 252 n.
(*h*) (1867), 8 B. & S. 228.

assigns should receive compensation for any injury occasioned by working the excepted minerals ; and (2) that the vendors (notwithstanding any act or default of theirs or of their testator's) had good title to convey,—the court held (1) that the plaintiff was not entitled (in respect of the damage to his land by subsidence) to any compensation (the covenant for compensation not extending to that, but to damage otherwise rightfully occasioned) ; and (2) that the plaintiff was entitled (in respect of such subsidence damage) to damages for breach of the covenant for title,—*scil.*, because the prior lease of the mines authorising a subsidence was a defect in the title of the vendors occasioned by the act of their testator.

SUBJACENT SUPPORT,—FOR LAND BUILT ON.

Subjacent support,—for land and for the buildings thereon,—(*a*) Being new buildings ;

Where it can be shown that the surface land (*i.e.*, the land in its natural state) would have subsided, even if there had been no buildings thereon,—and the surface owner is entitled to support for his surface land, the damages recoverable will include the value also of the buildings (*i*) ; but when the surface-owner is not entitled to such support, but is entitled (when he is entitled) to compensation in lieu of the right of support,—according to the distinction taken above,—then it is entirely a question of the true construction of the compensation clause, whether the damage extends to the surface only, or to the buildings on it also,—and if to the buildings also, then whether it is confined to the buildings then already erected on the surface, or extends to buildings subsequently erected (*k*).

(*b*) Being old buildings.

Also, a right of support for buildings on the surface will, after they have stood for twenty years, arise in favour of the surface-owner, and against the mine-owner (*l*),—*scil.*, by the Presciption Act, 1832 (*m*) ; but, *semble*, no such right could possibly arise, where by the terms of the original severance the right of support was excluded altogether,—*scil.*, because that would be an agreement in writing within the meaning of the Prescription Act which excluded the right from arising (*n*).

(*i*) *Brown* v. *Robins* (1859), 4 H. & N. 186 ; *Hunt* v. *Peake* (1860), John. 705 ; *Wyatt* v. *Harrison* (1832), 3 B. & Ad. 871.

(*k*) *Berkly* v. *Shafto* (1863), 15 C. B. (N.S.) 79.

(*l*) *Rogers* v. *Taylor* (1858), 2 H. & N. 828 ; *Bonomi* v. *Backhouse* (1858), E. & B. 622 ; *Hunt* v. *Peake* (1860), John. 705.

(*m*) 2 & 3 Will. 4, c. 71.

(*n*) *Ibid.* s. 7.

(ii.) Adjacent support,—Natural rights and easements in connection therewith.

Adjacent support,—a natural right, for land unbuilt on;

but an easement for land built on.

The right of lateral support which land in its natural state and unladen with buildings requires, is also an inherent or natural right of property (*o*), and is not an easement; but the right of lateral support to land with the buildings thereon is an *easement*; and if the buildings have had such support for twenty years,—under circumstances from which the right of lateral support can be properly implied, but not otherwise,—the owner will be entitled to the continuance of that support (*p*).

SUBSIDENCE, THROUGH MERE WEIGHT OF BUILDING ON SURFACE.

Newly built houses,—subsidence of, by their own weight.

Where a man builds up to his own boundary, and his neighbour afterwards excavates up to his (the adjoining) boundary, and the house (newly erected) falls, it (almost necessarily) falls by its own weight; and the rule therefore is, that the owner of the house cannot recover damages in respect of the house (*q*); and the damage to the land (as distinguished from the house) is usually inappreciable,—and if in an action commenced by the owner of the house for the subsidence damage, *the jury should find that the damage to the land is inappreciable*, that will be a good ground for dismissing the plaintiff's action with costs (*r*),—although there may be a technical injury to the plaintiff's right of support for his land (*s*).

Pleadings for plaintiff and for defendant respectively,—as regards the subsidence of new buildings.

Where the defendant is sued for having (through his mining operations in adjacent land) subsided a house newly built on the plaintiff's land,—if it appears, by the plaintiff's own statement of claim in the action, that the house is new and that the defendant has the title to the adjacent land (and to the minerals therein), the claim will be bad on the face of it (*t*); but otherwise the defendant must allege his title, and that the plaintiff had not (in respect of the house being a new house) any right to the

(*o*) *Wilde* v. *Minsterly* (1639), 2 Roll. Abr. 564; *Humphries* v. *Brogden* (1850), 12 Q. B. 739; *Hunt* v. *Peake*, *supra*; *Dalton* v. *Angus* (1881), 6 App. Cas. 740.

(*p*) *Wilde* v. *Minsterly*, *supra*; *Partridge* v. *Scott* (1838), 3 Mee. & W. 220; *Dalton* v. *Angus*, *supra*.

(*q*) *Wilde* v. *Minsterly* (1639), 2 Roll. Abr. 564, cited in *Jeffries* v. *Williams* (1850), 5 Exch. 792, on pp. 794—5.

(*r*) *Smith* v. *Thackerah* (1866), L. R. 1 C. P. 564.

(*s*) *Att.-Gen.* v. *Conduit Colliery Co.*, [1895] 1 Q. B. 301, at p. 313.

(*t*) *Wyatt* v. *Harrison*, 3 B. & Ad. 871; *Partridge* v. *Scott*, *supra*.

adjacent support,—and failing these allegations, he (the defendant) may be regarded as a mere trespasser, and liable accordingly (*u*).

ADDING TO WEIGHT OF BUILDING,—EFFECT OF.

Right of support,—may be lost, by adding to the weight of the buildings.

When any adjoining owner is entitled, in respect of the house on his land, to support from the neighbouring house ; and he materially adds to the weight of his house (by, *e.g.*, raising the height of the end wall which adjoins the neighbouring house),—the old right of support may be (in effect) lost,—*scil.*, because the old right of support (being a right acquired by user only) is measured by the extent of that user, and there is no right of support for the additional weight ; and if the neighbour lawfully excavates (or mines) in his own land, and the wall falls in consequence, that is a damage attributable to the addition made to the wall, and the neighbour will not be liable for it (*x*) ; but, *semble*, once the addition has stood for twenty years, the right to the necessary further adjacent support will have been acquired (*y*), notwithstanding the difficulty of preventing its acquisition (*z*). And apparently, these observations would also be applicable, when the support was subjacent or vertical, and not adjacent.

SUBSIDENCE,—ARISING WHOLLY APART FROM WEIGHT OF BUILDING ON SURFACE.

Newly built houses,—subsidence of, occasioned by the mineral workings purely and solely.

On the other hand, when the weight of the house has in no way contributed to the subsidence of the surface, the law is different. And in *Brown* v. *Robins* (*a*), where the plaintiff sued for the damage to his land occasioned through the defendant's adjacent mining operations ; and the jury found, that the subsidence of the plaintiff's land was in no way due to the weight of the building thereon, but was due to the defendant's workings, —and that the defendant (at the time of working) knew that the mines under plaintiff's land had been already worked, only ribs being left for support,—the court held, that the defendant, on these findings, was liable to the plaintiff for the damage to his

(*u*) *Jeffries* v. *Williams* (1850), 5 5 Exch. 792 ; *Bibby* v. *Carter* (1859), 4 H. & N. 153 ; 28 L. J. Exch. 182.

(*x*) *Murchie* v. *Black* (1865), 34 L. J. C. P. 337.

(*y*) *Dalton* v. *Angus* (1881), 6 App. Cas. 740.

(*z*) *Solomon* v. *Vintners Co.* (1859), 4 H. & N. 598 ; *Dalton* v. *Angus*, *supra*.

(*a*) (1859), 4 H. & N. 186 ; 28 L. J. Exch. 250.

land, including the building thereon, and whether such building had stood for twenty years or not, and although a piece of land intervened between the plaintiff's land and the defendant's land. And in *Hunt* v. *Peake* (*b*), there was a decision to the like effect, —the damage to the house being treated as incidental to the damage to the land, so that it was not necessary to consider whether the house was ancient or modern, or whether (if ancient) it had acquired a right of support.

Subsidence,—when necessary to show that the mineral workings have taken place within twenty years.

In *Partridge* v. *Scott* (*c*), where the mines under the plaintiff's land had been excavated up to the boundary, but the time when same had been excavated did not appear,—and the plaintiff had built two houses on the land ; and thereafter, and (as to the one of the houses) long after it had stood for twenty years but (as to the other house) well within twenty years of the building, the defendant worked the adjacent mines ; and the plaintiff's two houses (and apparently also the portion of his land that was unbuilt upon) subsided in consequence,—the court held, that the defendant was not liable for the subsidence, it not being shown (as regards the ancient house) that the excavation under the plaintiff's land had been in existence for more than twenty years before the subsidence (or before the defendant's workings),—so that, as regards both the houses indifferently, an express grant of the right to lateral support (sufficient to countervail the weakening of the vertical support) was required to be shown ; and that was not done, nor in fact attempted.

STRIP OF LAND INTERVENING,—EFFECT OF, ON THE RIGHT OF SUPPORT.

Adjacent support from neighbouring land,—what is neighbouring land.

In *Birmingham Corporation* v. *Allen* (*d*), where the plaintiffs had their gasworks on land the mines under which had been partly excavated by their predecessors in title,—and there was a strip of land adjoining to the west on the plaintiffs' land, and the mines under that strip had been wholly excavated,—and thereafter the defendants worked or were working the mines lying to the immediate west of the intervening strip of land, whereby the plaintiffs' gasworks subsided (or threatened to subside),—the court held, that the defendants were not liable for (and could not be restrained from causing) the subsidence,—it appearing that if the plaintiffs' land and the intervening strip had both remained

(*b*) (1860), John. 705 ; 29 L. J. Ch. 785.

(*c*) (1838), 3 Mee. & W. 220.

(*d*) (1877), 6 Ch. D. 284.

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in their natural (unexcavated) condition, the support from the intervening strip would have sufficed for the plaintiffs' land (and gasworks). And, in that case, JESSELL, M.R., defined a "*neighbour*" (or adjoining landowner), so far as regards the question of lateral support, as being one who usually adjoins in fact, but who need not adjoin in fact; and where he does not adjoin in fact, but some strip of land intervenes, then (for the purposes of this question) the neighbour is one whose land (being in its unexcavated state) is required and is sufficient for the support of the land the support to which is in question, while such last-mentioned land is also in its unexcavated state,—a definition which was accepted by (and approved in) the Court of Appeal. The words of JESSELL, M.R., were:—"The neighbouring landowner to me for this purpose must be the owner of that portion of land, whether a wider or narrower strip of land, the existence of which in its natural state is necessary for the support of my land. As long as that land remains in its natural state and it supports my land, I have no rights beyond it: and therefore it seems to me, that he is my neighbour for this purpose. There might be land of so solid a character, consisting of solid stone, that a foot of it would be enough to support the land. There might be other land so friable and of such an unsolid character, that you would want a quarter of a mile of it. But whatever it is, *as long as you have got enough land on your boundary, which (left untouched) will support your land, you have got your neighbour's land whose support you are entitled to.*"

ALUM MINES, AND ADJOINING PITCH MINES,—SUPPORT OF.

Alum mines, —support of, by subjacent pillars of coal.

Where there was a lease of alum mines; and the lessor afterwards let the coal mines, with divers liberties for working and getting the coal, *so always that the pillars of coal should not be removed so as to damage the alum workings*; and it appeared, that the alum mines would be damaged by subsidence, if the pillars of coal were worked,—the court said, that the pillars must be left (*e*).

Adjoining pitch lands, —support of.

In *Trinidad Asphalte Co.* v. *Ambard* (*ee*), where the plaintiff company and the defendant were respectively the owners of adjoining lands which contained a stratum of pitch a little

(*e*) *Glasgow* v. *Hurlet, etc. Alum Co.* (1850), 3 H. L. Cas. 25.

(*ee*) [1899] 2 Ch. 260 n.

below the surface, and the defendant was digging and getting the pitch in his own land, and was thereby causing the plaintiff company's pitch to bulge over upon and to ooze out into the defendant's land, and the defendant kept paring off and appropriating the pitch which so bulged over or oozed out,—and in consequence the bulging and oozing became continuous and was insensibly increasing,—and the plaintiff company's surface overlying their stratum of pitch was also being cracked and injured,—the court granted an injunction.

ELECTRIC LIGHTING WORKS, IN PUBLIC ROAD.

Constructions under public roads,—support of.

(1) Electric lighting works.

The owner of mines under or adjacent to any public road (or his lessee of the mines) is not bound to conduct his mines, in such a way as not to damage any line for electric lighting laid along or across such road,—although by agreement the electric lighting company may acquire the right to have the line protected against interference by the miner (*f*).

SEWERS, ETC., OF SANITARY AUTHORITY, IN PUBLIC ROAD.

(2) Public sewers.

Also, such mine-owner (or his lessee of the mines) may in general work and get the mines under or adjacent to public roads, without considering whether or not his workings shall injure the sewers of any sanitary authority placed in such road, —but the sanitary authority may (by notice requiring the sewers to be supported, and on payment of compensation for their interference with the mining operations) entitle themselves to the right of subjacent and adjacent support for their sewers, etc. (*g*).

Statutory provisions,—as to support of sewers.

As regards the support of the sewers and other the sanitary works of local authorities, the 46 & 47 Vict. c. 37, contains divers provisions enabling such authorities to exercise, as against mine-owners and mining lessees, all the like powers which a waterworks company may, for the support of their waterworks, exercise under the Waterworks Clauses Act, 1847 (*h*), ss. 18—27. And the notice to be given by the local authority, may define the nature of and the extent of the support which is required ; and may be in respect of mines either within or beyond the distance of forty yards prescribed by the Waterworks Clauses Act (s. 3) ; and subject to these provisions, the local

(*f*) 45 & 46 Vict. c. 56.
(*g*) 46 & 47 Vict. c. 37.
(*h*) 10 & 11 Vict. c. 17.

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authority is not to be deemed to have acquired (or to be bound to acquire or to be entitled to) any right of support; and the mine-owner or mining lessee on his part is not to be subject to any liability for the damage occasioned by his withdrawal of the support, provided he work the underlying and adjacent mines in a reasonable and proper manner (s. 4),—but these provisions are not to deprive the local authority of any right to support which they have already acquired, or to subject the authority to any new liability to pay any compensation therefor (s. 5).

Sewers, support of,—apart from statute.

Where a main sewer had been constructed under statutory authority; and within twenty years thereafter a railway company, lawfully constructing their underground railway, dug and excavated in the adjoining land, to a depth of sixteen feet below the level of the bottom of the sewer and at a distance of fifteen feet from the sewer and along the line of the sewer, building at the same time a retaining wall by the side of the railway bit by bit as the excavation proceeded; and in consequence of the excavation, the sewer cracked and sunk, and the retaining wall (being undermined by the liquid oozing from the sewer) eventually collapsed, and the sewer burst and flooded the railway to a depth of seven feet,—the court held, that the sewer had not acquired any right of lateral support, and the railway company was therefore not liable for the damage to the sewer,—*scil.*, for the cost of its re-construction (*i*).

(iii.) Support, subjacent and adjacent,—from water.

Water, support from,—

As regards the support derived from water, whether underground or adjacent, the surface owner is not, in general, entitled to that; and it makes no difference for this purpose, whether the water is there naturally (the soil being porous) (*k*), or whether it has been collected and left stagnant there (as in disused coal pits and shafts) (*l*). But if the surface owner should in any case have acquired by purchase or otherwise a right to have the water retained in its position and condition as at the time of the purchase,—or at the least, a right against the owner of the land (wherein or whereon the water is) to prevent him from doing any act which will alter that position or condition,

(1) As regards percolating water;

(2) As regards mine-water, long stagnant.

(*i*) *Metropolitan Board of Works* v. *Metropolitan Rail. Co.* (1869), L. R. 4 C. P. 192.

(*k*) *Popplewell* v. *Hodkinson* (1869), L. R. 4 Exch. 248.

(*l*) *North Eastern Rail. Co.* v. *Elliot* (1860), 1 J. & H. 145; 32 L. J. Ch. 402.

—then, in such a case, he would have an easement of support from the water ; and mine-water therefore may not, *semble*, be withdrawn, when it has been a long time stagnant, and houses have been built on the overlying surface upon the faith of the mine-water continuing (*m*).

(iv.) Compensation for surface (subsidence) damage.

Compensation, liability for,— (1) Generally ;

It is competent, of course, for absolute owners to agree that the mines shall not be worked at all during their severance from the surface ; but mining grants and mining exceptions and reservations usually contemplate the working of the mines, and expressly give and grant also (or reserve) extraordinary liberties or powers over and in respect of the surface,—in which latter case, there is usually annexed to the exercise of the express liberties the condition that reasonable compensation shall be paid for any damage to the surface occasioned by the mining operations, that is to say, by the exercise of such liberties.

LIABILITY RUNS WITH THE LIBERTY.

(2) Whether payable by an assignee of the liberty to subside,— who exercises the liberty.

And as regards these provisions for compensation, the question arises, whether the liability under them runs with the land so as to bind the assignee of the original grantor ; and the answer to this question has proved of a somewhat difficult character. For although it was well settled, on the one hand, that the owner of land could not subject it to a new species of burden so as to bind the land in the hands of an assignee (*n*) ; and that a covenant to pay a *collateral* sum of money,—although in express terms purporting to bind the assignee and so to run with the land,—would not bind the assignee (*o*) ; and that the equitable doctrine of notice,—whereby an assignee, although not named in the covenant or otherwise legally bound thereby, was notwithstanding bound in equity to the same extent as if the covenant was one which ran with the land at law,—was a doctrine inapplicable to any covenants other than restrictive covenants (*p*) ; and although it was equally well-settled, that a covenant to pay rent ran with the land (*q*), and that such a covenant also ran

(*m*) *Littledale* v. *Lonsdale* (1791), 2 H. Bl. 267, 299, cited in *Jordeson* v. *Sutton Gas Co.*, [1899] 2 Ch. 217 (a case of "running silt").

(*n*) *Keppell* v. *Bailey* (1834), 2 My. & K. 517.

(*o*) *Spencer's Case* (1582), 5 Rep. 16 ; *Bally* v. *Wells* (1769), 3 Wils. 25.

(*p*) *Haywood* v. *Brunswick Benefit Building Society* (1881), 8 Q. B. D. 403.

(*q*) 32 Hen. 8, c. 34.

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with an incorporeal hereditament such as a license or way-leave (*r*); and although as between landlord and tenant,—that is to say, in the case of leases,—the courts had held, that a covenant to pay compensation for surface damage, and to pay it *whenever and so often as the damage was done*, was in the nature of a covenant to pay rent, and so that it ran with the land, binding the successive assignees of the leasehold interest (*s*),—still the question remained (and it was a question of the most serious character to purchasers of mines and to their lessees), namely,—Whether, as between independent fee simple owners who (or whose respective predecessors in title) had originally derived title under one common vendor, the covenant to pay compensation for surface damage (or the condition in that behalf annexed to the liberty) could be made to run with the land, or was otherwise attendant upon the liberty as exercised by the assignee?

Assignee,—liability of.

This question was answered in the affirmative in the case of *Aspden* v. *Seddon* (*t*). In that case, there had been a sale in fee simple of a plot of land,—the sale being made subject to a perpetual fee farm rent, and with an exception of the mines and minerals and with certain liberties of working; and these liberties gave no right of entry upon the surface (expressly excluding that right), but (as interpreted by the court) (*u*) they gave the right of subsiding the surface, if a subsidence should happen, in the ordinary working and getting of the mines; and there was annexed to these liberties the condition (or covenant) following, that is to say,—"*so that compensation in money be made by him or them*" (meaning by the grantor his heirs and assigns) "*for all damage that shall be done to the erections on the said plot by the exercise of any of the said excepted liberties or in consequence thereof*": And the grantor, in and by the indenture of grant and exception—that is, of the conveyance on the sale—had covenanted for himself, his heirs, executors and administrators, that he (the grantor), his appointees, heirs, executors, administrators *or assigns*, would from time to time, and at all times thereafter, make and pay full and reasonable compensation for all damage, spoil, injury, or loss that should or might from time to time be sustained by the owner

(*r*) *Egremont* v. *Keene* (1838), 2 Jones, 307.

(*s*) *Muskett* v. *Hill* (1839), 5 Bing. N. C. 694; *Martyn* v. *Williams* (1857), 1 H. & N. 817; *Norval* v. *Pascoe* (1864), 34 L. J. Ch. 83.

(*t*) (1875), 1 Ex. D. 496.

(*u*) *Aspden* v. *Seddon* (1875), L. R. 10 Ch. App.

for the time being of the plot of land, or of any erections or buildings for the time being thereon, for or by reason of, or in respect or in consequence of the searching for, getting, working or carrying away of any of the excepted mines,—the indenture containing also a covenant by the grantee (or purchaser) to erect, and at all times thereafter to maintain in good repair, upon the land, a substantial building, etc., suitable for a cotton mill, fairly worth to be let to a tenant or tenants at a rack rental of at least 150*l.* a year. And it appeared, upon the special case which was stated for the decision of the question, that (after one mesne assignment of the excepted mines and mining liberties and rent-charge, *which was expressly stated to be subject to the provisions for compensation for damage to arise from the exercise of such liberties*) the same mines and liberties, together with certain adjoining freehold lands and the mines and minerals thereunder, were (but not the rent-charge) assigned to the defendant, it not being expressed in this last assignment that the assignment was subject to the like (or any) provisions for compensation for damage to arise from the exercise of the mining liberties; but the defendant fully admitted that he had notice of the provisions for compensation contained in the indenture of original severance. And it further appeared, that the original purchaser of the surface had bought in the perpetual fee farm rent, and had sold and conveyed the surface to the plaintiff discharged of that rent. And the cause of action alleged by the plaintiff was this, namely, that by reason of the defendant's subjacent workings under the plaintiff's land, or by reason of his workings under the said adjoining freehold lands, or by reason of his combined workings under both, the plaintiff's land had subsided (which was admitted to be the fact), and the mill and buildings thereon had become ruinous and useless for the purpose of spinning and manufacturing cotton. And under these circumstances, and upon these allegations and admissions, the court held, that the defendant was liable to the plaintiff to make compensation for the damage to the surface and to the buildings thereon, whether the same had arisen from the workings under the subjacent or under the adjacent lands, or from both workings in combination,—BRAMWELL, B., saying:—That the defendant, having taken his property with notice that it possessed a right with a burden attached to that right, and having exercised that right, was liable to pay to the plaintiff the prescribed compensation; and MELLISH, L.J., saying:—It is no doubt true, that you cannot annex to land a burthen unknown to the law; but it had

Assignee, liability of,—principle of.

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been a common practice, ever since the ownership of surface lands and of the minerals thereunder had been severed, to make it a term of the severance that if the surface was let down compensation should be paid ; and as regards the coal under copyhold tenements, it would be a perfectly legal custom which entitled the lord of the manor to get all the coal under the copyhold lands, paying compensation to the copyholder for any damage occasioned to the surface in getting them ; and inclosure Acts also constantly gave such right. It was therefore a perfectly well-known right ; it did not impose any unusual burthen ; and it would be most unjust that the owner of the minerals, having got them under the express license to do so, should refuse to pay the compensation which was recoverable under the proviso or qualification annexed to the license.

Assignee, liability of,—reasonableness of.

The decision in *Aspden* v. *Seddon*, *supra*, approves itself to the reason ; but the legal correctness of the decision is somewhat difficult to understand. For admitting that the assign of the original grantor was liable to pay the compensation,—who was the "assign" ? Was it the original grantor's assign of the rent charge (*x*), or was it his assign of the mines and mining liberties ? The defendant alleged and contended, that it was the assign of the rent-charge (and not himself, the assign of the mines and mining liberties) who was to pay the compensation,—especially seeing that the compensation was applicable towards the restoration of the surface and of the buildings thereon as a security for the rent-charge (*y*). And the fact, that the rent-charge had been bought up and merged, appeared to the defendant to be a circumstance of some importance in the case ; and the fact also, that in the assignment of the mines and mining liberties to the defendant the qualification as to paying the compensation was omitted was a not unimportant consideration. Clearly also, the plaintiff had his remedy against his own vendor (or against the first vendor) to recover the damages sustained to his mill and premises, these damages being recoverable for breach of the covenant for title of that vendor,—the right to cause a subsidence being a blot on the title (*z*). But still the defendant was the person who had actually done the damage under his right to do it ; and the decision of the court was, that the

(*x*) *Doe* v. *Reid* (1830), 10 B. & C. 849 ; *Clegg* v. *Hands* (1890), 44 Ch. D. 503.

(*y*) *Keats* v. *Lyon* (1869), L. R. 4 Ch. App. 218, at pp. 222—3 ; *White* v. *Southend Hotel Co.*, [1897] 1 Ch. 767.

(*z*) *Shafto* v. *Johnson* (1863), 8 B. & S. 253 n ; *Taylor* v. *Shafto* (1867), 8 B. & S. 228.

plaintiff had his remedy direct against the defendant,—leaving the defendant to pursue his own remedy (if any) against the vendor to him.

LIABILITY,—WHEN PERSONAL ONLY.

Personal liability to pay,—not binding on assignee.

In *Ex parte Drew* (*a*) where A. the owner of Blackacre and B. the owner of Whiteacre mutually covenanted to bear the expense of keeping in repair a private road of which they had the joint use, and to bear such expense in proportion to the acreage of their respective properties fronting the road ; and the deed expressed, that the intention of the covenant was, that, by virtue of the deed, the expense of the repair of the road should be considered as a charge in equity, and (as far as circumstances would permit) at law also, upon the owners for the time being of Blackacre and Whiteacre respectively in the above proportions,—it was held, that the proviso did not create a charge on the lands ; and the court said it was not even a covenant running with the use of the land, but was a merely personal undertaking. But, of course, if the parties had taken care to express themselves differently, the liability might have been made (and in building grants it is commonly made) to run with the lands according to the frontage of each.

LIABILITY, EXEMPTION FROM, WHEN PERSONAL ONLY.

Exemption from liability, —when discharged, or ineffective.

In *Richards* v. *Harper* (*b*), where the owner of freehold lands and of certain copyhold land adjoining sold the copyhold land ; and, in the purchase deed which accompanied the surrender, the purchaser covenanted and granted, that the vendor his heirs and assigns and his and their lessees might work in the adjoining freehold lands without being liable to make compensation for any injury to the copyhold land caused by such working, and further that the purchaser his heirs and assigns would indemnify the vendor his heirs and assigns against any claims for such damage ; and the purchaser then proceeded to an enfranchisement of the copyhold land, and sold it (as enfranchised) to the Church Building Commissioners who in turn sold it to the plaintiff,—the plaintiff having had no notice of the firstly mentioned purchase deed, or of the covenants on the purchaser's part therein contained,—and subsequently, the defendant (claiming under the first vendor) worked the minerals under

(*a*) (1866), L. R. 2 Eq. 207. (*b*) (1866), L. R. 1 Exch. 199.

the freehold lands to which the copyhold adjoined, and in so doing caused the plaintiff's land to subside whereby the buildings thereon were damaged,—the court held, that the defendant was liable to make compensation to the plaintiff: and MARTIN, B., observed (in effect), that whatever the effect of the purchaser's covenant might have been if the copyhold land had originally been freehold land, the fact that it was copyhold at the time of the covenant made all the difference,—the lord not being bound by such covenant, and (by reason of the subsequent enfranchisement) the plaintiff now had the lord's title. And, under the circumstances, that decision was doubtless right,—and the reason given therefor also right; but, *semble*, the defendant (having had judgment against him for the damages) would be entitled to proceed against the estate of the first purchaser on that purchaser's covenant of indemnity contained in the first purchase deed.

COMPENSATION, WHEN INCLUDED IN ORIGINAL PURCHASE MONEY.

Compensation paid for original purchase,—may have included the subsequent damage,—

In *Croft* v. *London and North Western Rail. Co.* (*c*), the plaintiff had conveyed to the defendant company a stratum of the subsoil under his surface lands, with liberty to construct therein (and to afterwards use) a tunnel for the passage of the company's trains; and the consideration for the company's purchase (which had been ascertained by arbitration) was the amount ascertained for the purchase of the site of the tunnel and for the compensation for the injurious affection of the plaintiff's other lands (including his surface lands and the buildings thereon); and it appeared that the subsoil consisted (in places) of clay and loose earth; and soon afterwards the

(*a*) Expressly;

plaintiff's surface subsided, and the buildings thereon cracked and were otherwise damaged,—through the lawful acts of the railway company, and without any negligence on their part; and the court said, that the plaintiff had been (or must be taken to have been) already compensated for that damage,—being a damage which could have been (and doubtless was) foreseen at the time of the arbitration; although if the company had been guilty of negligence, it might have been otherwise.

Or (*b*) Impliedly,—(1) As regards a railroad;

In *Rex* v. *Leeds and Selby Rail. Co.* (*d*), the defendant company had acquired (compulsorily and under the provisions

(*c*) (1863), 32 L. J. Q. B. 113. (*d*) (1835), 3 Ad. & E. 683.

of their railway Act) certain lands of I. under which there were coal mines, and the mines were (at the time) in lease to K.; and the mines were by the Act excepted out of the railway company's purchase, with liberty to work them, *not injuring the railway, and repairing any injury which might be occasioned by the working*: and the purchase money paid to I. did not (it was conceded) include anything for the mines. And two or three years afterwards, when K.'s colliery workings were approaching near to the railway line, he discovered that he could not work them so fully or so profitably as (but for maintaining the railway) he might have done; and he claimed to have a jury to assess the compensation payable to him for such "*injurious affection*" of the mines,—But the court said, that the Act excluded that,—having provided for the claim being satisfied on or before the first acquisition by the company of the surface lands; and the court thought it would be very inconvenient to the company, if claims for compensation were brought forward continually from time to time, after the construction of the railway. And similarly, in *R.* v. *Aire and Calder Navigation* (*e*), which was a *mandamus* to the defendant company to summon a jury for assessing the compensation payable in respect of the damage sustained by the prosecutor as lessee of the coal under and adjacent to the defendant company's canal, by reason of his inability to work and get such coal (to the full extent) without damaging the canal,—the Act under which the canal was constructed leaving the mines and minerals in the then owners thereof, with full power to work and get, *not injuring the canal*,—it appeared, that under the Act the jury (on the first taking of the lands) were "*to assess the sum to be paid for the purchase of the lands and also what other separate and distinct sum should be paid by way of recompense for (in effect) the injurious affection of the other lands of the grantor*, and that a large lump sum had been paid on the original taking of the lands by the canal company; and the question really was, whether in that lump sum there was included, in fact (or must be deemed to have been included), the compensation now claimed,—and the court was of that opinion, following the principle of the decision in *Rex* v. *Leeds and Selby Rail. Co.* (*f*).

(2) As regards a canal;

Where the Canal Act under which a canal is constructed and under which the lands for its construction are authorised to be

(3) As regards a tramway and also, generally.

(*e*) (1861), 30 L. J. Q. B. 337. (*f*) (1835), 3 Ad. & E. 683.

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acquired, provides expressly, that the undertakers before constructing the canal shall pay and satisfy the landowners for the lands taken, *and for all lands damaged [or to be damaged] by the making and subsequent maintenance or preservation of the canal*,—the better opinion appears to be, that the canal is entitled to a right of support from the subjacent and adjacent minerals,—*scil.*, because that is necessary for the maintenance or preservation of the canal once it is constructed, *and the damage to the mine-owner, which arises from the necessity of his leaving support to the canal, is a damage which the Act provides for being paid in the first instance* (*g*). And the principle which in such a case is applicable to a canal is also applicable to a tramway; and the right of support would continue, even after the tramway was converted into an ordinary railway,—at least, where the added weight only accelerates (and does not contribute to) the damage by subsidence from the mineral workings (*h*).

PURCHASE OF SURFACE, WHERE SUPPORT ALREADY WITHDRAWN.

Sale of surface,—where support already weakened, effect, when subsequent subsidence.

If a man buys a property, and the mines within and under it have been already gotten and carried away,—to his (the purchaser's) knowledge; and a subsidence of the surface afterwards occurs, in consequence of the previous withdrawal of the minerals,—the purchaser cannot sue his vendor on the covenant for title; nor yet on the covenant for quiet enjoyment; nor yet on the covenant of indemnity,—*scil.*, where all these covenants are the usual covenants in purchase deeds (*i*); but in such a case, the purchaser must (if he can) obtain a covenant of express indemnity against the subsidence happening (*k*). And, *semble*, the law would be the same, where the purchaser did not know that the minerals had been already worked out,—*scil.*, unless the vendor had been guilty of any fraud in the selling.

PURCHASE OF SURFACE ALREADY DAMAGED.

Sale of surface,—already damaged,

In *Mordue* v. *Durham* (*Dean and Chapter*) (*l*), the plaintiff was the fee simple owner of the surface, having acquired the same under the defendants; and in the conveyance to the

(*g*) *London and North-Western Rail. Co.* v. *Evans*, [1893] 1 Ch. 16.
(*h*) *Great Western Rail. Co.* v. *Cefn Brick Co.*, [1894] 2 Ch. 157.
(*i*) *Spoor* v. *Green* (1874), L. R. 9 Exch. 99.
(*k*) *Ibid.*, at p. 110.
(*l*) (1873), L. R. 8 C. P. 336.

plaintiff, the mines and minerals were excepted to the defendants with large surface rights, the defendants (or their lessees of the mines and surface rights) making to the plaintiff compensation for damage. The plaintiff's surface was a colliery surface, that is to say, there was an old unused pit upon it ; and the defendants (or their lessee, who was a co-defendant) had, in divers ways, exercised the reserved surface rights,—and the plaintiff claimed compensation under the qualification as to compensation which was annexed to the reservation of surface rights,—the plaintiff's claim being,—(1) as regards the land used and occupied, the marketable annual value of the land regarded as freely useable ; and (2) as regards the other land, some payment for the damage caused thereto by severance. And the court held, that he was entitled to the compensation and damage which he claimed,—for that he was an ordinary freehold owner of a colliery surface, and entitled to use it for all purposes (whether by building thereon or otherwise) to which it could be reasonably applied ; but the compensation would not extend to the old unused pit (while it continued unused), *the plaintiff having bought his surface with that damage already done to it, and (presumably) for a less price accordingly.*

effect, where subsequent further damage.

RECURRENT COMPENSATION FOR RECURRENT SURFACE DAMAGE.

In *Aspden* v. *Seddon* (*m*), there was an exception of minerals with liberty to work and get them (even although a subsidence of the surface should be thereby occasioned) ; but to the right of working the qualification was annexed, that compensation should be paid for all damage to the surface,—and the court said, that whoever exercised the liberty (which was in the nature of a *continuing* liberty) was liable to pay the compensation so far as the damage was caused by his exercise of the liberty,—*scil.*, because he was not obliged to exercise the liberty, but if he did exercise it, he (impliedly) promised to pay compensation. And that decision was followed (or applied) in *Dimond* v. *Pennington* (*n*), where limestone quarries were excepted out of a renewable lease (and also out of the fee simple reversion as subsequently purchased by the lessee), with power to get them, paying compensation for the damage ; and such compensation was held to be recoverable against the estate of the deceased exceptee, as

Successive subsidences, —successive compensation.

(*m*) (1876), 1 Ex. D. 496. (*n*) (1888), W. N., p. 112.

a simple contract debt,—that is to say, compensation for the damage extending over the six years last past before action.

MUTUAL ADJACENT SUPPORT,—PURCHASE OF.

Mutual support,—purchase of; and price for title to.

In *Baird* v. *Bell* (*o*), where X. was possessed of two plots of adjoining building land; and he erected a house on one of the plots, with a gable end which was intended as a "*mutual gable*" for that house and for the house to be erected on the adjoining plot; and he then sold and conveyed to the plaintiff the plot on which the house had been built, together with the house thereon; and subsequently he sold the other plot to the defendant, who proceeded to build a house on it, making use for that purpose of the gable end of the plaintiff's house,—The court held, that the plaintiff was the person entitled to be paid by the defendant the one half the value of the mutual gable which (under a certain custom in that behalf) the defendant had a right to use only upon the terms of paying such half value to someone,—so that, on the sale of the plot first sold, the vendor should have seen that the purchase money for that first plot was sufficient, having regard to the right which the purchaser of it would have (against the subsequent purchaser of the adjoining plot) to be paid for the use of the gable by such subsequent purchaser; or else the vendor should (and, *semble*, he may), in the sale and conveyance of the first plot, expressly reserve to himself and his assigns, *in respect of the adjoining* land, the right to use the "*mutual gable*" without any payment therefor.

DAMAGE LEGALISED BY STATUTE,—COMPENSATION.

Damage rightfully caused,—compensation for;

For damage legalised by statute,—just as for damage occasioned in the exercise of a right,—what is recovered is compensation (properly so called) and not damage (*p*),—*scil.*, if the Act annexes compensation to the doing of the damage; but where it does not do so, then neither compensation nor damages properly so called are recoverable for the damage so legalised (*q*); but for damages resulting from a negligent doing of the act legalised, damages will always be recoverable (*r*). Thus, in *Clowes* v. *Staffordshire Waterworks Co.* (*s*), where the

(*o*) [1898] A. C. 420.
(*p*) *Rex* v. *Pease* (1832), 4 B. & A. 30; *Vaughan* v. *Taff Vale Rail. Co.* (1860), 5 H. & N. 679; *Hammersmith Rail. Co.* v. *Brand* (1868), L. R. 4 H. L. 171.
(*q*) *London, etc. Rail. Co.* v. *Truman* (1885), 11 App. Cas. 45.
(*r*) *Geddes* v. *Bann Reservoir Proprietors* (1878), 3 App. Cas. 430.
(*s*) (1872), L. R. 8 Ch. App. 125.

waterworks company had constructed a sufficient compensation reservoir (intended for storing the water during floods, so that the rights of the mill-owners on the stream to a full supply of water might be maintained),—the special Act under which the company acquired the lands and streams for their works and for the compensation reservoir having required the maintenance of those rights,—and the plaintiff (the owner of certain dye works on the stream) complained that the company (by reason of their misuse of the reservoir) made the water "*more muddy*" than before,—the court held, that the plaintiff's complaint was well justified, the Act giving the company no right to pollute the water,—so that damages (and not compensation) was recoverable for the company's wrongful act. And similarly, in *Evans* v. *Manchester, etc. Rail. Co.* (*t*), the defendant company's canal was subsided by underground mineral workings,—and the canal water escaped by leakage into the plaintiff's mine; and it appearing that the defendants had been guilty of negligence in not stopping the leakage, the court held the defendants liable for the damage, the court being of opinion that even if the subsidence were wrongfully occasioned by the mine-owner the defendants would still be liable,—*scil.*, for the negligence.

and damage beyond,—as for negligence.

SECTION II.—*On Injuries from Underground Water,—and, in particular, where arising from Trespasses to Barriers.*

NATURAL AND FOREIGN WATER.

The underground water in mines is regarded as the common enemy, against which every miner must combat for himself not relying upon his neighbour to protect him against it (*u*); and the custom which accordingly prevails in most mining districts is, for each miner to work to the very end of his boundary on the dip, leaving a barrier of his own minerals on the rise,—which barrier, if the adjoining owner on the rise should break through it, and thereby the water should pass down into the mine to which the barrier belongs, the owner of the latter mine will have an action against him (*x*).

Underground water,—(1) Natural, of mine.

(*t*) (1887), 36 Ch. D. 626.

(*u*) *Trower* v. *Chadwick* (1839), 6 Bing. N. C. 1.

(*x*) *Firmstone* v. *Wheeley* (1844), 13 L. J. (N.S.) Exch. 361.

(2) Foreign, not of mine.

And as regards foreign water,—that is to say, water not naturally in (or flowing by gravitation in and from) the mine, —if damage is done thereby to the adjoining mine, the owner of the latter mine will have an action for the damage. Thus, in *Baird* v. *Williamson* (*y*), where the plaintiff and the defendant were respectively the owners of adjoining mines, and the plaintiff's mine was the lower one and the defendant's the upper one ; and in both mines there were two ironstone seams extending from the surface of the lands over the defendant's mine through that mine into and through the plaintiff's mine ; and the upper seam (which was only separated a few yards from the lower seam) had been worked out in both the plaintiff's and the defendant's mine,—no barrier being left,—so that the water in that seam flowing naturally from the defendant's mine passed down into the plaintiff's mine ; and the defendant then proceeded to work the lower ironstone seam in his own mine, and in doing so (and in the ordinary course of skilful mining) he connected that seam with the upper seam by means of a crut ; and (as a consequence of that connection) the water in the lower seam in the defendant's mine, and (by pumping up) other water from the defendant's mine, was carried artificially from (or through) that seam into the upper seam in the defendant's mine, and from thence flowed naturally into the plaintiff's mine,—and the plaintiff complained of this artificial addition to the amount of the water coming from the defendant's mine into his (the plaintiff's) mine,—the court said, that the defendant was liable for the artificial addition, ERLE, C.J., observing, that the general law did not entitle the owner of the higher mine to exceed the natural gravitation of the water : So that the law appears in such cases to be this, namely, that the owner of the upper of two adjoining mines is not liable for injury by water flowing by gravitation into the lower mine from works conducted by him in the usual and proper manner for the purpose of getting mineral from any part of his mine ; but he must not interfere with such gravitation, so as to make the water more injurious to the lower mine or more advantageous to himself ; for if he do so, and be thereby an *active* agent in sending water to the lower mine, an action will lie against him by the owner of the lower mine for the injury the water may occasion,—*scil.*, for the disturbance of the natural gravitation.

(*y*) (1863), 15 C. B. (N.S.) 376 ; 33 L. J. C. P. 101.

DIVERSION OF NATURAL CHANNEL.

Diversion of channel,—consequential damage from.

And where a man diverts the course of a river, and conveys it by a new (and artificial) channel, he will be liable for any insufficiency in the new channel,—whereby (and by reason of the escape and overflow of the water therefrom) damage is done to the mines below (*z*); and he will be so liable, *semble*, even for damage arising from any extraordinary flood (*a*).

Diversion of channel,—where no damage from, in fact.

In *West Cumberland Iron and Steel Co.* v. *Kenyon* (*b*), there had been an interference by the defendant with the natural gravitation of certain mine-water,—but such interference ceased within the confines of the defendant's own land,—and the water as it left his land flowed in the direction, and in the quantity, and according to the gravitation, in and according to which it had flowed before the interference, and in and according to which it would still flow if there had been no interference,—and the court held, that under such circumstances the defendant was not liable for the damage occasioned to the plaintiffs' mine by the overflow of the water.

DAMAGES, RECOVERABLE FOR INJURY FROM WATER.

Present and prospective damage,—in one action.

Usually, for the damages sustained from any trespass to barriers there is but one action; and the whole of the damages, actual and prospective, must be recovered once for all. Thus, in *Clegg* v. *Dearden* (*c*), where the plaintiffs had recovered damages against the defendant for an inroad of underground water, the inroad of the water having been occasioned through the defendant's weakening of the plaintiffs' barrier; and subsequently the plaintiffs sued the defendant for *permitting the barrier to remain unclosed*, whereby the water *continued to flow* into the plaintiffs' mines,—the court held, that the plaintiffs were not entitled to recover, DENMAN, L.C.J., saying:—That there was no legal obligation upon a trespasser to replace what he had pulled down or destroyed on the land of another; and although the defendant was liable for the original trespass to the barrier, his omitting to fill up the excavation therein was neither a continuation of the original trespass nor was it a

(*z*) *Fletcher* v. *Smith* (otherwise *Smith* v. *Musgrave*) (1877), 2 App. Cas. 781.
(*a*) *Nichols* v. *Marsland* (1876), 2 Ex. D. 1; *Crompton* v. *Lea* (1874), L. R. 19 Eq. 115.
(*b*) (1879), 11 Ch. D. 782.
(*c*) (1848), 17 L. J. (N.S.) Q. B. 233.

breach of any legal duty; and the continuing damage was merely consequential, and must be taken to have been included in the damages recovered in the former action.

Damages,—recoverable against the wrongdoer,—not against any stranger to him.

Also, it is the trespasser himself who is to be sued,—and not any stranger to him who subsequently (so to speak) sets the damage in motion. For, in *Smith* v. *Kenrick* (*d*), where there were two adjoining mines, and in the plaintiff's mine (which lay on a lower level than the defendant's mine) there was a barrier of coal left by plaintiff for the protection of his mine,—and there had been a trespass to this barrier, committed before the defendant's time, by a stranger to the defendant, the trespass having consisted in driving three large holes or drifts through the barrier; and in the defendant's mine there was a thick stratum of unworked coal; and above it a large body of water had collected (by natural filtration), and was held back only by the stratum; and the defendant worked out the stratum, and the water accordingly flowing down passed (through the holes or drifts in plaintiff's barrier) into plaintiff's mine,—the court held, that the defendant was not liable to the plaintiff for that,—*scil.*, because the defendant was not responsible for the trespass to plaintiff's barrier, and had a right to work and get his own coal; and his knowledge beforehand of the inevitable injury to plaintiff from the water escaping, did not deprive him of that right, or even oblige him to give the plaintiff notice beforehand of the intention to work (*e*).

WATER, BROUGHT ARTIFICIALLY ON SURFACE, ESCAPING INTO MINE.

Foreign surface water,—escaping into mine,—liability for.

In *Rylands* v. *Fletcher* (*f*), where certain mill-owners made a reservoir for collecting water as well from their own lands as from adjoining lands; and they employed in the construction of the reservoir a competent engineer and a competent contractor; but the contractor did not provide sufficient support to resist the pressure of the water upon certain old shafts met with in the course of constructing the reservoir, and which old shafts had belonged to (and still communicated with) certain old mining works, the existence of which was wholly unknown to the mill-owners and to their engineer and to the contractor;

(*d*) (1849), 7 C. B. 515; 18 L. J. (N.S.) C. P. 172.

(*e*) *Trower* v. *Chadwick* (1839), 8 Scott, 1; 6 Bing. N. C. 1.

(*f*) (1866), 3 H. & N. 774; 35 L. J. Exch. 154; L. R. 1 Exch. 265; L. R. 3 H. L. 330.

and after a time the water from the reservoir, escaping down the old shafts and getting into the old workings, penetrated thence into and flooded the plaintiff's colliery below,—The court held, that notwithstanding the absence of negligence on the part of the mill-owners, they were liable, on the ground that they had caused *foreign water* to descend down by artificial means into the plaintiff's mine,—the rule of law being, that the person who for his own purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; and if he does not do so, he is *primâ facie* answerable for all the damage which is the natural consequence of its escape: Which general rule is, on principle, just,—because a person whose grass or corn is eaten down by the escaping cattle of his neighbour, *or whose mine is flooded by the water from his neighbour's reservoir*, or whose habitation is made unhealthy by the fumes of his neighbour's smelting works, is damnified without any fault of his own, the neighbour having brought something on his own property which was not naturally there,—a something harmless to others, while and so far as it is confined on his own property, but which he knows would be mischievous if it escapes on to his neighbour's property; and in all such cases, he is obliged to make good the damage which ensues from the escape,—*scil.*, because but for his own act it would not have been there at all.

Natural water diverted,—escaping into mine,—liability for.

In *Fletcher* v. *Smith* (*g*), where the plaintiff (Smith) and the defendant (Fletcher) were respectively the owners of adjoining closes of land and of the mines thereunder; and the defendant in working his mines had diverted a natural stream on the surface of his lands, and (as the jury found) had not made the substituted course of the stream of sufficient capacity, or otherwise sufficient for the rainfall ordinarily to be expected in the country,—and an extraordinary rainfall happening, the river overflowed into the hollow spaces in defendant's land, and passed thence into the plaintiff's mines,—the court held the defendant liable. On the other hand, in *Wilson* v. *Waddell* (*h*), where the defendant was the lessee of a coal-field on the rise, and the plaintiff was the subsequent lessee of an adjoining coal-field on the dip,—both leases having been granted by the same lessor; and the defendant's lease contained a covenant to restore the

(*g*) (1877), 2 App. Cas. 781; *Smith* v. *Fletcher* (1873—4), L. R. 7 Exch. 305; L. R. 9 Exch. 64.

(*h*) (1876), 2 App. Cas. 95.

CHAP. XIII.

INJURIES FROM UNDERGROUND WATER, ETC.

surface; and the defendant had, in the course of working, removed the surface (which was practically waterproof), and had not restored it on the exhaustion of his mine; and in consequence of the non-restoration of the surface, a large quantity of rain-water collected thereon, and passed down through the unrestored surface (through natural percolation) into the defendant's exhausted mine, and from thence flowed by natural gravitation into the plaintiff's mine,—whereby the plaintiff's mine was damaged,—the court said, the defendant was not liable to the plaintiff. And the court intimated (but the point had not been argued), that the fact of the defendant's liability to his own lessor to restore the surface, and his neglect to do so, made no difference; but the right of the subsequent lessee (regarded as an assignee of part of the estate of that lessor) (*i*) ought, *semble*, to have entitled that lessee to damages for the non-restoration,—it not having been competent for that lessor alone to waive the breach of that covenant.

CANAL COMPANY,—WHEN NOT LIABLE.

Canal water escaping into mine,—when canal company not liable.

In *Dunn* v. *Birmingham Canal Navigation* (*k*), where the defendants' canal had been constructed under an Act of Parliament, which authorised the company, to take land compulsorily for the construction of the canal, doing as little damage as might be, and to do all things necessary for making and preserving and using the canal, making satisfaction for all damages to be sustained by the owners of lands and hereditaments taken or prejudiced by the execution of the powers of the Act; and the minerals under the canal were expressly reserved to the owners, who were to be at liberty, subject to the provisions of the Act, to work the minerals, provided that no injury was done to the navigation; but they were not to work the minerals without giving three months' notice to the defendant company, who might, if they thought proper, prevent the working of the mines, paying to the owners the value, failing which the owners might work: and after the canal had been in use for many years, the plaintiff, who was owner of coal mines under it, gave the defendants notice of his intention to work them; and the defendants refusing to pay him their value, he proceeded to work the mines, knowing that the effect would probably be to disturb the strata, and that there was danger of the water escaping

(*i*) *Taite* v. *Gosling* (1879), 11 Ch. D. 272.

(*k*) (1872), L. R. 8 Q. B. 42.

from the canal into the mines ; and the result of the working was, that the strata became dislocated, and the water of the canal escaped through the cracks and flooded the workings, and the plaintiff was obliged to abandon his coal,—the court held, that the defendant company was not liable.

CONTINUING ESCAPE OF WATER, DUTY TO STOP.

Underground water,—escaping through trespass to barrier,—duty to stop the continuing escape.

In *Firmstone* v. *Wheeley* (*l*), where the plaintiff and the defendant were respectively the owners of adjoining collieries, and the defendant had wrongfully broken through the plaintiff's barrier, and water from the defendant's mine flowed into the plaintiff's mine,—the court suggested that the defendant might be liable to take care of his water. However, in *Clegg* v. *Dearden* (*m*), where the defendant (or his predecessors in title) had wrongfully broken through the barrier, and had paid the plaintiff (or his predecessors in title) the damages (direct and consequential) for that injury, as assessed in an arbitration directed in an action brought for the injury ; and the plaintiff sued for what he called the "further damage" arising from the aperture in the barrier remaining unclosed, and he alleged that the defendant was under a duty either to close it, or else to take care of his water,—the court said, that the damages already recovered comprised such further damage ; and further that the defendant was under no duty to close up the aperture in plaintiff's barrier,—and he could not, without a further trespass, do so. And in *Lomax* v. *Stott* (*n*), where the plaintiff's predecessor in title had wrongfully broken through the defendant's barrier, and the plaintiff sued the defendant for letting his mine-water flow into plaintiff's mines through the aperture,—the court said, that, so far as the water flowed by natural gravitation (and was not conducted by artificial pipes) through the aperture, the defendant was not liable ; and the court would not require him to stop the flow,—although (while it suited the defendant's own purposes to do so) he had, in fact, prevented the flow by pumping and otherwise.

UNWATERING SCHEMES FOR ADJOINING MINES.

Adjoining mines,—schemes for unwatering of.

In *Scott's Mines Co.* v. *Leadhills Mines Co.* (*o*), the plaintiff company and the defendant company were lessees of adjoining

(*l*) (1844), 13 L. J. Exch. 361.
(*m*) (1848), 17 L. J. Q. B. 233.
(*n*) (1870), 39 L. J. Ch. 834.
(*o*) (1859), 34 L. T. (o.s.) 34.

(lead) mines, under one lessor; and the leases were granted upon a general scheme, according to which the upper mines were entitled to use the levels and drifts in the lower mines (in a reasonable manner) for (among other purposes) unwatering the higher mines; and the complaint was, that the defendant company was making an undue and unreasonable use of that liberty; but it appeared that the defendant company's workings were in accordance with the usual mode of working lead mines in the district, and were conducted without negligence, although somewhat too effectively for the plaintiff company's convenience; and the court said, that the defendant company were not exceeding in their use of the reserved liberty the reasonable use thereof, although the water flowing down into the lower mine was greatly increased by reason of the defendant company's unusually vigorous working, and by their extension of the old workings, such extension being lawful.

Measure of the mutual rights of user.

INJUNCTION TO STAY IRRUPTION OF WATER.

Injunction, (1) Against actively sending down the water;

In *Beaufort* (*Duke*) v. *Morris* (*p*), upon an allegation that the defendant, in working his mines, was sending down water from his mine into a drift whereby it flowed down to the plaintiff's mine,—thereby greatly increasing the water which the plaintiff had to pump out of his own mine to keep it dry,—the court granted an injunction, restraining the defendant from (in effect) actively continuing to send down the water,—until (in effect) the right of the defendant to do so was established at law. And in *Westminster Brymbo Coal. Co.* v. *Clayton* (*q*), where the plaintiff and the defendant were independent adjoining mine-owners; and the plaintiff's mine lay to the dip of the defendant's mine, and was partly protected against the water from the defendant's mine by a fault and in other part by a barrier; and the plaintiff cut through or perforated the barrier; and subsequently the defendant (in effect) conducted his water towards the barrier, so that the water (so artificially collected out of the defendant's mine) passed through the hole in the barrier, and flooded the plaintiff's mine,—the court restrained the defendant from so *artificially* collecting and conducting water into the plaintiff's mine, although the defendant alleged (and alleged truly) that the plaintiff was to blame for having cut through the barrier; but the injunction was granted merely in order to keep

(*p*) (1847), 6 Ha. 340.

(*q*) (1867), 36 L. J. (N.S.) Ch. 476.

matters straight until the trial; and possibly the plaintiff (before the trial) closed up the perforation in the barrier, which (as the barrier was his own) he could lawfully do.

(2) Against ceasing to pump the water.

Where a man was in possession of (and was working) a colliery under an agreement for a lease, and the agreement was specifically enforceable,—and he had been pumping out the water in the seam; and if he desisted pumping, the water would flood the whole colliery,—the court was of opinion, that an injunction might be granted against him to restrain his discontinuance of the pumping,—and partly upon the ground that irretrievable loss to the colliery would be thereby saved at a comparatively trifling expense, but chiefly upon the ground that the lessor himself could not, without a trespass, enter upon the colliery, in order to continue the pumping himself (*r*).

SECTION III.—*On Mining Nuisances,—and on Injuries proceeding from Unfenced Pits, Shafts, etc.*

(i.) Mining nuisances.

NUISANCES LEGALISED BY TIME.

A continued user for twenty years will legalise a private nuisance (*s*); and a subsequent purchaser will, of course, take subject to the nuisance (*t*),—provided the full period of twenty years has run, but not otherwise (*u*).

NUISANCES AFFECTING THE ENJOYMENT OF PROPERTY.

Smelting works,—nuisance from.

A smelting-house, whereby the grass of an adjoining field is withered, is a nuisance (*x*); and in *St. Helen's Smelting Co.* v. *Tipping* (*y*), where the nuisance was occasioned to trees and shrubs by the vapours from large smelting works, a distinction was drawn between nuisances producing personal discomfort and nuisances producing material injury to property; and if the injury was to property, the court said, that it mattered not whether the plaintiff came to the nuisance or the nuisance came to him.

(*r*) *Strelley* v. *Pearson* (1880), 15 Ch. D. 113.

(*s*) Viner's Abr. Nuisances G.; *Wright* v. *Williams* (1836), 1 M. & W. 77.

(*t*) *Bliss* v. *Hall* (1838), 5 Scott, 500.

(*u*) Assiz. Book, 4, pl. 3, p. 6; *Elliotson* v. *Feetham* (1835), 2 Bing. N. C. 134.

(*x*) 1 Roll. Abr. P. 88, Action on the Case, pl. 6, 7.

(*y*) (1863—4), 2 B. & S. 608; 4 *ibid.* 616; 35 L. J. Q. B. 66 (H. L.).

Brick kiln,—nuisance from.

In *Walter* v. *Selfe* (*z*), where a brick kiln had been erected within fifty yards of a residence, and thereby smoke, vapour, and floating substances became mixed with the air of the house and pleasure grounds, K. BRUCE, V.-C., said, the plaintiff, although not entitled to air as fresh, free, and pure as at the time of building his house, was yet entitled to have the air kept in such a condition as was compatible with physical comfort; and the nuisance not being fanciful, but very real and sensible,—and materially interfering with the ordinary comfort of existence,—he granted the injunction.

Brick kiln,—proper use of.

A proprietor may burn bricks on his own land, and for building houses there, if he select a proper place for the process (*a*),—provided the nuisance be only temporary, and be duly kept in check, but not otherwise (*b*); and the court will have regard to the means taken for preventing discomfort (*c*).

(ii.) Unfenced pits, shafts, etc.

NO DUTY TO FENCE,—AT COMMON LAW.

Duty to fence,—none at common law, as against strangers

By the common law, an owner or occupier is not obliged to fence round a pit which he digs in his own land (*d*); and therefore if A. seised of a waste adjoining a highway dig a pit in the waste within thirty-six feet of the way, and the mare of B. escape into the waste, and fall into the pit, and there die, B. shall not have any action against A.,—*scil.*, because the making of the pit in the waste and not in the highway was not any tort to B., but it was by the default of B. himself that his mare escaped (*e*). And where there was a quarry situate in an open waste, and there were two public highways leading over the waste; and the quarry being unfenced, the plaintiff, at night, in passing from one of the roads to the other, went astray and fell into the quarry,—It was held, that the owners of the quarry were under no obligation to fence off the quarry, and so were not liable to the plaintiff for the injury (*f*).

Duty to fence,—in favour of

In *Groucott* v. *Williams* (*g*), where the surface and the mines belonged to different proprietors; and the proprietor of the

(*z*) (1851), 4 De G. & S. 315.
(*a*) *Hole* v. *Barlow* (1858), 4 C. B. (N.S.) 334; 27 L. J. C. P. 207.
(*b*) *Bamford v. Turnley* (1860—2), 3 B. & S. 62, 66.
(*c*) *Cavey* v. *Lidbetter* (1863), 13 C. B. (N.S.) 470; 32 L. J. C. P. 104.
(*d*) Roll. Abr. 88, pl. 4; *Jordin* v. *Crump* (1841), 8 Mee. & W. 782.
(*e*) *Blythe* v. *Topham* (1607), 1 Roll. Abr., Action on the Case, (P.) Nuisances; Cro. Jac. 158; *Jordin* v. *Crump* (1841), 8 Mee. & W. 782.
(*f*) *Hounsell* v. *Smyth* (1860), 7 C. B. (N.S.) 731; 29 L. J. C. P. 203.
(*g*) (1863), 32 L. J. Q. B. 237.

mines had sunk a shaft in the surface, and on ceasing to use it, had placed an arch of stone over the mouth of the shaft; but he afterwards removed the arch; and the only protection left, consisted of branches of wood, with stones laid thereon; and a horse belonging to the occupier of the surface fell down the shaft and was killed,—the mine-owner was held liable for the loss of the horse.

surface-owner.

DUTY TO FENCE,—BY STATUTE.

Duty to fence,—by statute, in favour even of strangers.

By the Quarry (Fencing) Act, 1887 (*h*), s. 3, it is provided that where any quarry dangerous to the public is in open or unenclosed land within fifty yards of a highway or place of public resort dedicated to the public, and is not separated therefrom by a secure and sufficient fence, it shall be kept reasonably fenced for the prevention of accidents; and unless so kept, shall be deemed to be a nuisance, liable to be dealt with summarily in manner provided by the Public Health Act, 1875; and (by s. 4) the term quarry is to include every pit or opening (not being a natural opening) made for the purpose of getting stone, slates, lime, chalk, clay, gravel, or sand.

CROWN LESSEES,—DUTY OF, TO FENCE.

Crown-lessee of lead mine, —duty of, to fence,—at common law;

In *Evans* v. *Mostyn* (*i*), where the plaintiff was the lessor of a lead mine, and the lessee had abandoned the mine, leaving the mouth of the shaft open or only covered over with rotten wood, —so that the shaft was insecurely fenced within the Mines Regulation Acts; and (although situate within an inclosure) it was dangerous to people on the highway (which was only five to eight yards off),—and also, of course, to persons and cattle lawfully within the inclosure,—the court said, the lessor was liable,—*scil.*, because he failed to show who else was liable; and he was, moreover, a person "*interested in*" the lead (*i.e.*, in the minerals), having a lien thereon for his royalties,—although the mine had been abandoned for twenty years. However, in *Arkwright* v. *Evans* (*k*), the plaintiff was the lessee of the crown (in respect of the duchy of Lancaster) of the manorial rights of the crown in and in respect of the lead mines within Wirksworth in Derbyshire; and, in particular, he was lessee (but by way of receiver only) of the duties of lot and cope,—and he paid a rent to the crown in respect of the lease; and it

(*h*) 50 & 51 Vict. c. 19.
(*i*) (1877), 2 C. P. D. 547.
(*k*) (1880), 49 L. J. M. C. 82.

appeared, that the shaft of a lead mine (which had been abandoned) was within fifty yards of a public way, and that the mouth of such shaft was not securely fenced as, in the case of ordinary shafts when abandoned, is required by the 35 & 36 Vict. c. 77, s. 13,—and the court said, that as crown-lessee the plaintiff was not liable under that Act for the mouth of the shaft being left as it was; but who was liable in such a case, the court did not say; and the peculiar circumstances of the case did not seem to the court to have been provided for by the Act. This matter has now, however, been provided for,—and the crown-lessee would, in such a case, be held liable, either as "*owner*" of the mine, or as a person interested in the minerals (*l*).

or, at all events, by statute.

(iii.) Mining nuisances, no abatement of, by local boards.

Summary remedy not available.

As regards nuisances proceeding from mines, or from smelting works or other like works, local boards (or district councils) are debarred by s. 334 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), from taking summary proceedings for their abatement; but they may (as relators) set the attorney-general in motion, in an information for the abatement of the nuisance (*m*); and they may sue in their own corporate name for an injury occasioned by a mining subsidence to the corporate property (*n*),—or in fact for any other surface-damage occasioned by mining,—and may recover the compensation payable for the damage, where the act which causes it is rightful (as being justified by the excepted liberties of working and getting the mines),—it being always understood, that where the local board (or district council) proceeds by action (as distinguished from information) special damage must be shown to have been sustained by the local board (or district council) (*o*).

Information or action,—necessity for.

(*l*) *Devonshire* (*Duke*) v. *Stokes* (1897), 13 T. L. R. 376.
(*m*) *Att.-Gen.* v. *Logan*, [1891] 2 Q. B. 100.
(*n*) *Ibid.*
(*o*) *Bishop Auckland Local Board* v. *Bishop Auckland Iron and Steel Co.* (1882), 10 Q. B. D. 138; *Wallasey Local Board* v. *Gracey* (1887), 36 Ch. D. 593.

REMEDY BY INJUNCTION, ETC.

SECTION IV.—*On the Remedy by Injunction,—and on Receivers and Managers,—and on the Remedy by Account,—and on other Remedies in connection with Mines.*

(i.) The remedy by injunction.

INJUNCTIONS, AGAINST TRESPASSES AND OTHER TORTS.

Injunctions, —against mining trespasses;

Courts of equity have for a long time been in the habit of giving relief by *injunction*, to restrain trespasses in mining cases (*p*),—as, *e.g.*, to restrain the taking of nodules of clay used for making cement, and found on the sea beach (*q*); to restrain mining waste by a copyholder, at the instance of the lord (*r*); or to prohibit an owner, who has a limited right to take stone from a quarry, from abusing his right (*s*). And although a distinction used formerly to be taken between waste properly so called and trespass properly so called (*t*), the courts latterly made no such distinction so far as regards the granting of this relief by injunction (*u*); and under the Judicature Acts, 1873—1875, the injunction will, in either case, be granted, wherever that relief is "*just and convenient.*" But the nature of mining requires that the works should be kept in a constant state of repair and activity; and as a general rule, therefore, the court will not interfere by injunction, on motion, and before the cause is fully heard,—in cases where there has been delay and expenditure incurred in the meantime (*x*); and delay alone will justify the court in withholding this remedy, on interlocutory application,—unless to save some irreparable mischief; but the delay will usually itself refute the allegation of irreparable mischief (*y*).

unless, where that remedy lost, by delay.

Mining operations,— not, as a rule, to be stayed, on motion;

In *Clavering* v. *Clavering* (*z*), where the application (by motion) was to restrain a lessee from working a coal pit irregularly and detrimentally, the court refused the injunction, saying that to stay the working of a colliery was a great inconvenience

(*p*) *Gibson* v. *Smith* (1741), Barn. Ch. Rep. 497; *Player* v. *Roberts* (1631), W. Jones, 242; *Grey* v. *Duke of Northumberland* (1806), 13 Ves. 236; 17 Ves. 281; *Norway* v. *Rowe* (1812), 19 Ves. 144.

(*q*) *Earl Cowper* v. *Baker* (1810), 17 Ves. 128.

(*r*) *Richards* v. *Noble* (1807), 3 Mer. 673.

(*s*) *Thomas* v. *Oakley* (1811), 18 Ves. 184; *Thomas* v. *Jones* (1842), 1 Y. & C. C. C. 510.

(*t*) *Mogg* v. *Mogg* (1786), 2 Dick. 670; *Haigh* v. *Jaggar* (1845—7), 2 Coll. C. C. 231; *Talbot* v. *Hope-Scott* (1858), 4 K. & J. 96, 135.

(*u*) *Lowndes* v. *Bettle* (1864), 33 L. J. Ch. 451.

(*x*) *Grey* v. *Duke of Northumberland* (1806), 13 Ves. 236; 17 Ves. 282; *Field* v. *Beaumont* (1818), 1 Swanst 208; *Pollard* v. *Clayton* (1855), 1 Kay & J. 462.

(*y*) *Parrott* v. *Palmer* (1834), 3 My. & K. 632; *Birmingham Canal Company* v. *Lloyd* (1812), 18 Ves. 515.

(*z*) (1726), 2 P. W. 388.

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on all occasions, and the court would never do it but where there was either the breach of an express covenant or else an uncontroverted mischief; and there is also the hostility of rival coal owners to be considered (*a*).

secus, at the trial,—irrespectively of consequences.

In granting or refusing an injunction the effect of which will or may be to stop or seriously incommode mining operations,—although considerations of public convenience and relative or comparative injury, will weigh with the court upon an interlocutory application,—yet when the merits of the case and the respective rights of the parties come to be determined upon the final hearing of the cause, or at the trial of the action, they receive very little weight (*b*), and no weight at all when the mine-owner claims a right to repeat the wrongful or injurious act; but where there is no such claim of right, and the damage is slight, and especially if it is the result of accident rather than of wilful purpose or of negligence, the court will in general refuse to grant an injunction, and will give damages in lieu of the injunction (*c*).

INJUNCTIONS, AGAINST BREACHES OF CONTRACT.

Injunction,—against breach of covenant.

In *Mexborough (Earl)* v. *Bower* (*d*), where the plaintiff was the lessor and the defendant was his lessee of certain coal mines, and the lessee had covenanted to leave sufficient barriers against the adjoining coal, and not to work into or through any adjoining colliery,—and, in breach of that covenant, he had made and was using a communication with an adjoining colliery, justifying the breach upon the pretext that the demised colliery was thereby improved,—the court restrained the defendant from leaving the communication open, and from otherwise continuing the breach of the covenant.

INJUNCTIONS, AS AN INDIRECT MODE OF SPECIFIC PERFORMANCE.

Injunction,—to enforce rights, generally;

An injunction is not unfrequently the relief available to enforce the performance *in specie* of a covenant or other agreement in a mining lease. Thus, in *Ward* v. *Buckingham* (*e*),

(*a*) *Birmingham Canal Company* v. *Lloyd* (1812), 18 Ves. 515.

(*b*) *Raphael* v. *Thames Valley Rail. Co.* (1867), L. R. 2 Ch. App. 147; *Att.-Gen.* v. *Ely, etc. Rail. Co.* (1869), L. R. 4 Ch. App. 194; and *Att.-Gen.* v. *Mid Kent, etc. Rail. Co.* (1867), L. R. 3 Ch. App. 100.

(*c*) *Cooke* v. *Forbes* (1867), L. R. 5 Eq. 166.

(*d*) (1843), 7 Beav. 127.

(*e*) Cited at p. 161, in *Nutbrown* v. *Thornton* (1806), 10 Ves. 159.

where there was a lease of alum works, and the lease contained a covenant by the lessee to leave plant (up to a specified value) on the premises at the expiration of the lease,—the court said an injunction *quia timet* might be granted, upon a case made against the lessee of his intention to denude the alum works; for, although damages for breach of the covenant was the legal remedy, yet, the lessee being very impecunious, the legal remedy might have proved unsatisfactory; but the true reason upon which the court proceeded was, the agreement of the parties, to the effect that after the expiration of the lease the premises should be in a condition to enable the lessor to continue the alum works.

unless where remedy by injunction lost by delay, with expenditure.

Where a canal company received into their canal water from certain pools or ponds which were supplied by the water issuing from a drowned mine; and the owner of that mine gave the company notice of his intention to resume the working of the mine, and (with a view thereto) to pump the mine dry,—and the company (although they objected) took no action to prevent him until he had expended some thousands of pounds in the preliminary pumping,—the court refused the company an injunction, considering that (under the circumstances) the right to the injunction, if it ever existed, had been lost by the delay of the canal company,—so that damages alone were recoverable, if the colliery-owner was doing them any wrong (*f*).

(ii.) Receiver and manager, appointment of.

Receiver,—or receiver and manager,—appointment of: (1) On behalf of co-owners

Where there is a co-ownership in mines, and one of the co-owners is wholly excluded (or ousted) by the other co-owners, he may have a receiver of the mines (*g*),—*scil.*, because otherwise his title might (after twelve years) be wholly barred; but, of course, he could also proceed by ejectment for the ouster.

And in the case of such co-ownership as aforesaid, where there is no such exclusion (or ouster), a receiver will not be appointed of the mine,—*scil.*, unless where the co-ownership is really a co-partnership, and a dissolution of the partnership is portion of the relief claimed (*h*).

Where the plaintiff was part-owner of some coal mines, and the defendants were the other part-owners, and one of

(*f*) *Birmingham Canal Co.* v. *Lloyd* (1812), 18 Ves. 515.

(*g*) *Sandford* v. *Ballard* (1864), 33 Beav. 401.

(*h*) *Roberts* v. *Eberhardt* (1853), Kay, 148.

the defendants was (and for a long time had been) the manager of the colliery,—the court said, that a colliery was a trade, and accordingly (and with a view to a dissolution of the colliery business) a receiver might be appointed of the colliery, and such receiver would (in the general case) be constituted the manager also (*i*).

And the fact that one of the part-owners had mortgaged his share would not prevent a receiver and manager being appointed of the mine (*k*),—the questions between the mortgagor and mortgagee not affecting the part-ownership of the original part-owners.

(2) On behalf of plaintiff,—who claims rescission of contract;

In *Gibbs* v. *David* (*l*), where the plaintiff had purchased of the defendant a leasehold colliery, and had been let into possession of (and was working) the colliery, and he claimed to have the purchase agreement rescinded on the ground of the defendant's fraud,—the court appointed a receiver and manager of the colliery, because the colliery, if not worked, might be forfeited by the lessor, and because also its abandonment by the purchaser would irretrievably ruin it. And the plaintiff was allowed to nominate the receiver and manager (subject to the defendant objecting); and was also to find the necessary expenses in the first instance, the ultimate liability therefor depending on the result of the action; and all this was in accordance with the principles of the court, applicable where the title to a troublesome property was in the plaintiff or in the defendant, but it was for the moment uncertain in which of them the title was (*m*).

(3) On behalf of unpaid vendor;

(4) On behalf of debenture holders;

(5) On behalf of person claiming lien.

And in *Boyle* v. *Betty's Llantwit Colliery Co.* (*n*), on the application of an unpaid vendor of the property of a company, in voluntary liquidation and unable from insolvency to carry on its works, the court appointed the vendor receiver, but without salary. And in *Peek* v. *Trinsmaran Iron Co.* (*o*), upon the interlocutory application of the plaintiffs (holders of debenture bonds of all the company's property), a receiver and manager was appointed, as the mining property could not otherwise have been preserved. Also, in *Norris* v. *Chambers* (*p*), which was the case of a foreign mine, the court appointed a receiver,—pending litigation (in the courts of the country where the mine

(*i*) *Jefferys* v. *Smith* (1820), 1 J. & W. 298.
(*k*) *Rowe* v. *Wood* (1820), 2 J. & W. 555.
(*l*) (1875), L. R. 20 Eq. 373.
(*m*) *Boehm* v. *Wood* (1820), 2 J. & W. 236.
(*n*) (1876), 2 Ch. D. 726.
(*o*) (1876), 2 Ch. D. 115.
(*p*) (1861), 30 L. J. Ch. 285.

was situate) by the plaintiff to substantiate his claim to a lien on the property.

(iii.) Trespass and case; ejectment and trover, etc.

Trespass,—remedy by.

Trespass lies in respect of any direct injury to a mine; and case lies for any damage caused indirectly to the mine; and as between a landlord and his lessee,—or between a tenant for life and the reversioner or remainderman,—an action of waste will lie,—such action now being an action in the nature of waste, and being really undistinguishable from an ordinary action of trespass, or action on the case. Also, the lessor of a mine may maintain an action on the case against his lessee for an injury to his reversion, for an improper working of the mine; and he is not obliged to have recourse to his action for breach of covenant, even where such latter remedy would be applicable (*q*).

Case,—remedy by.

Ejectment,—remedy by.

An ejectment will lie for mines (*r*),—as well opened as unopened (*s*),—*scil.*, where the plaintiff is entitled to the possession of the mines; but as regards a mere licensee of mines, he cannot, *semble*, bring ejectment,—not being entitled (when he is not entitled) to the exclusive possession (*t*).

Trover,—remedy by.

When the minerals have been severed, and become mere personal chattels, an action of trover will be maintainable for their value (*u*); and a mere licensee of mines is entitled to maintain this action (*x*).

Use and occupation,—action for.

An action for use and occupation is maintainable, in respect of a shaft which has been let by a written agreement not under seal, if the defendant has taken possession of the shaft; and the question, whether the defendant has or has not taken the possession, is a question of fact (*y*).

(*q*) *Muskett* v. *Hill* (1839), 5 Bing. N. C. 694; *Haward* v. *Bankes* (1760), 2 Burr. 1113.

(*r*) *Comyn* v. *Kyneto* (1606), Cro. Jac. 150; *Andrews* v. *Whittingham* (1693), 1 Salk. 255.

(*s*) *Sayer* v. *Pierce* (1789), 1 Ves. sen. 232; *Wilkinson* v. *Proud* (1843), 11 M. & W. 33; 12 L. J. (N.S.) Exch. 227.

(*t*) *Doe* d. *Hanley* v. *Wood* (1819), 2 Barn. & Ald. 739, 740.

(*u*) *Wilson* v. *Mackreth* (1766), 3 Burr. 1825; *Rowe* v. *Brenton* (1828), 8 Barn. & C. 737; *Rowe* v. *Grenfell* (1824), R. & M. 396.

(*x*) *Northam* v. *Bowden* (1855), 24 L. J. Exch. 237; 11 Exch. Rep. 70; and see *Thorogood* v. *Robinson* (1845), 14 L. J. (N.S.) Q. B. 87.

(*y*) *Walters* v. *Northern Coal Mining Co.* (1855), 25 L. J. (N.S.) Ch. 633.

(iv.) Account.

Account,—remedy by.

Mining being regarded as a species of trade, an action lies for an account of the profits (*z*) ; and although the claim for an account is usually conjoined with the claim for an injunction, still the conjunction is not essential ; and at any rate, an account may be decreed where an injunction is refused (*a*),—but there should be no avoidable delay in commencing the action (*b*).

Account,—right to, and nature of.

The plaintiff must, of course, show his right to the account,—that is to say, that he is in a position which entitles him to the account (*c*) ; for it is not everyone that is so entitled. But a mortgagor is entitled to the account, against the mortgagee in possession ; and in such a case, the mortgagee must account, not only for what he has actually received, but for what he might, but for his gross mismanagement or wilful neglect, have received (*d*),—all "*just allowances*" being made to him ; and as regards any extraordinary expenses, an enquiry will be directed (*e*). Also, a partner will be entitled to an account against his co-partner (*f*); and a principal against his agent (*g*), —the reasonable expenses being, in either case, allowed (*h*).

(v.) Arbitration.

Arbitration, —remedy by; and stay of actions :

The usual agreement to refer all disputes to arbitration will not, in general, oust the jurisdiction of the court (*i*) ; and therefore, where, in the lease of a coal mine, the lessee covenanted to raise at least 4,000 tons of coal ; and it was agreed, that all differences should be settled by arbitration, with mutual covenants to obey the award, and not to bring any action or suit without first submitting all matters to arbitration,—the court said, that these provisions could not be pleaded in bar of an action for not raising the stipulated quantity of coal (*k*). But, under the Arbitration Act, 1889 (*l*), continuing the like provisions contained in the Common Law Procedure Act, 1854 (s. 11), it is provided, that when any differences are agreed to be referred to

(*z*) *Bishop of Winchester* v. *Knight* (1717), 1 P. W. 406 ; *Clavering* v. *Westley* (1735), 3 P. W. 402 ; *Norway* v. *Rowe* (1812), 19 Ves. 144 ; *Rowe* v. *Wood* (1820), 2 Jac. & W. 559.

(*a*) *Parrott* v. *Palmer* (1834), 3 My. & K. 632.

(*b*) *Parrott* v. *Palmer*, *supra*.

(*c*) *Sayer* v. *Pierce* (1749), 1 Ves. sen. 232.

(*d*) *Hughes* v. *Williams* (1806), 12 Ves. 493.

(*e*) *Norton* v. *Cooper* (1854), 25 L. J. Ch. 121 ; 5 De G. M. & G. 728.

(*f*) *Rowe* v. *Wood* (1820), 2 J. & W. 556.

(*g*) *Crease* v. *Penprase* (1837), 2 Yo. & C. 527.

(*h*) *Scott* v. *Nesbitt* (1808), 14 Ves. 445.

(*i*) *Cooke* v. *Cooke* (1867), L. R. 4 Eq. 77.

(*k*) *Horton* v. *Sayer* (1859), 4 H. & N. 643 ; *Scott* v. *Avery* (1853), 8 Exch. 497 ; 5 H. L. Cas. 811.

(*l*) 52 & 53 Vict. c. 49.

arbitration, and any action is commenced, the court may,—on the application of the defendant, after appearance and before plea, and on being satisfied that no sufficient reason exists for not referring the matter to arbitration, and that the defendants were and still are ready to concur in all acts necessary for that purpose,—order all proceedings to be stayed, on such terms as to costs and otherwise as the court or judge may think fit, with power to discharge or vary any such order. And accordingly, since 1854, if there has been an agreement to refer, the court will, in general, stay an action commenced by either party relative to any of the disputes comprised in the agreement (*m*); but where a question of law is involved, and the question is one for the decision of which it would be the duty of the arbitrator, upon the request of either party, to state a special case for the opinion of the court, the court will not, in general, stay the action until that question has been decided (*n*). Also, under such an agreement, when it is contained in partnership articles, the court is in the habit of staying all actions whatsoever by either partner (or his executors) against the other partners relative to any partnership matter, or relative even to the dissolution of the partnership (*o*) or to any matter arising in the proceedings incidental thereto (*p*). And the court will not, in the general case, restrain the proceedings in an arbitration,—not even when the matter is (alleged to be) outside the agreement of reference (*q*); but where an action has been commenced impeaching the agreement itself, the court will restrain the proceedings in the arbitration (*r*); and in a proper case, leave will be given to revoke the submission (*s*),—or the court will otherwise interfere to control (and to direct) the arbitration proceedings (*t*).

(1) Under agreements generally;

(2) Under partnership agreements;

In *Willesford* v. *Watson* (*u*), where the mine-lease contained an agreement to refer all disputes between the lessors and the lessees; and the lessees sank a shaft, and through the shaft drew minerals from an adjoining mine; and the lessors commenced an action to restrain them from so doing,—the court (on the defendant's application) stayed the action,—and left it

(3) Under agreement contained in mining lease.

(*m*) 52 & 53 Vict. c. 49, s. 4.

(*n*) *Clegg* v. *Clegg* (1890), 44 Ch. D. 200; *Barnes* v. *Youngs*, [1898] 1 Ch. 414.

(*o*) *Vawdrey* v. *Simpson*, [1896] 1 Ch. 166.

(*p*) *Belfield* v. *Bourne*, [1894] 1 Ch. 521.

(*q*) *North London Rail. Co.* v. *Great Northern Rail. Co.* (1883), 11 Q. B. D. 30.

(*r*) *Kitts* v. *Moore*, [1895] 1 Q. B. 253.

(*s*) 52 & 53 Vict. c. 49, s. 1; *In re Gerard and Others*, [1895] 1 Q. B. 459.

(*t*) *Hart* v. *Duke* (1863), 32 L. J. (N.S.) Q. B. 55.

(*u*) (1873), L. R. 14 Eq. 572; 8 Ch. App. 473.

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to the arbitrators to decide, whether the matters in dispute between the parties were or not within the agreement; and also to decide, whether the claims of the lessors were or not against good faith; and the arbitrators were also to have power to direct payment of the damages.

Arbitration, —when compulsory and exclusive.

Also, where, as in *Caledonian Rail. Co.* v. *Greenock, etc. Rail. Co.* (*x*), the so-called agreement to refer disputes is incorporated in the statutes of the company,—or where it is otherwise compulsory,—it will usually be found to be exclusive of the ordinary jurisdiction of the courts,—and any reference commenced or proceeding thereunder will not be restrained,—at least, in the absence of circumstances which render it inequitable to enter upon or to proceed with the reference (*y*).

Arbitration, —special case may be stated therein.

In an arbitration proceeding under the Arbitration Act, 1889 (52 & 53 Vict. c. 49), any or either party to the arbitration may, at any stage of the proceedings, apply to the court, under s. 19 of the Act, for an order directing the arbitrator to state, in the form of a special case, any question of law arising in the course of the reference,—provided the question is one of substance (*z*); but the application must, in general, be made during the proceedings, and not after the award has been made (*a*). The award may, however, be remitted to the arbitrator for reconsideration,—equally as if the submission contained a rule to that effect (*b*). Also, the arbitrator may, of his own motion, submit a special case to the court (*c*).

Award,— enforcement of.

An award (*scil.*, an award made under the provisions of the 52 & 53 Vict. c. 49) may, for just cause, be set aside (*d*); and if not set aside, it is enforceable as a judgment of the court (*e*),—but by leave only; which leave is obtained on summons (*f*).

(vi.) Ascertainment of boundaries.

Boundaries between adjoining mines,— ascertainment of.

An action lies to determine a question of disputed boundary between two mineral properties; and in *Sayer* v. *Pierce* (*g*), where the plaintiff was the lessee of a coal-field under the Bishop of Durham; and he sued the defendant (an adjoining

(*x*) (1874), L. R. 2 H. L. Sc. 347.
(*y*) *Pickering* v. *Cape Town Rail. Co.* (1865), L. R. 1 Eq. 84.
(*z*) *In re Palmer and Hosken*, [1898] 1 Q. B. 131.
(*a*) *Tabernacle Building Society* v. *Knight*, [1892] A. C. 298.
(*b*) *In re Keighley and Others*, [1892] 1 Q. B. at p. 410; 52 & 53 Vict. c. 49, s. 10.
(*c*) 52 & 53 Vict. c. 49, s. 7 (6).
(*d*) *Ibid.* s. 11 (2).
(*e*) *Ibid.* s. 12; *Willesden Local Board* v. *Wright*, [1896] 2 Q. B. 412.
(*f*) Ord. liv. r. 4 (f).
(*g*) (1749), 1 Ves. sen. 232.

colliery lessee) for an account of the coal wrongfully gotten by the latter, and also for an ascertainment of the boundaries between the two coal-fields,—but it appeared, that the plaintiff sued only in respect of his legal title, and that he had never entered under his lease,—the court said he must (as the law then stood) bring his ejectment first, and then return into equity, when the boundaries would be ascertained.

(vii.) Foreclosure.

Foreclosure, —remedy of mortgagee;

In *Redmayne* v. *Forster* (*h*), where the plaintiff was the equitable mortgagee by deposit of certain shares in a mining co-partnership,—*scil.*, of five out of the nine shares of one of the co-partners therein; and by the articles of partnership, the co-partners had a right of pre-emption, in case of any sale of the shares; and after the mortgage, the collieries had been extended and improved, at a huge expenditure on the part of the partners,—the court held, that the plaintiff was entitled to a decree of foreclosure against her own mortgagor,—the co-partners having also liberty to redeem the plaintiff, if the mortgagor failed to do so; and failing redemption, the plaintiff was declared entitled as a co-partner,—in which latter case, she would not be at liberty to question the past expenditure, but would be entitled to an account, to ascertain what was the proportion of the existing debts and liabilities of the partnership which was properly attributable to the five shares in mortgage to her.

with special account,—as to expenditure on mine.

(viii.) Inspection.

Inspection,—in case of alleged trespass;

The court will, in a proper case, make an order for the inspection of a mine where the owner shows good ground for suspecting a trespass by the neighbouring owner, and is unable to ascertain in his own lands whether such trespass has been committed or not (*i*).

Inspection,—order for: (1) Under the general jurisdiction of the court;

And the court will also, where it makes an order for inspection, grant also all the needful incidental powers; and will also direct the removal of all obstructions to the inspection,—but, of course, not so as to destroy the colliery of the defendants (*k*);

(*h*) (1866), L. R. 2 Eq. 467.

(*i*) *Lonsdale* (*Earl*) v. *Curwen* (1799), 3 Bligh, 168, n; *Bennitt* v. *Whitehouse* (1860), 28 Beav. 119.

(*k*) *Walker* v. *Fletcher* (1804), 3 Bligh, 172, n.; *Browne* v. *Moore* (1814), 3 Bligh, 178, n.

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and the plaintiff will usually have to undertake to make good the damage occasioned by the inspection.

And where, in *Bennett* v. *Griffiths* (*l*), it appeared that the plaintiff and the defendants were respectively owners of adjoining coal mines ; and the plaintiff had obtained leave from the defendants to examine their mine, and had found that a wall had been lately built on the boundary of the two mines, which prevented him from looking beyond into his own mine, to see if any of his own coal had been wrongfully worked ; and an inspector of mines, in pursuance of an order of the judge, examined the wall, and reported that a sufficient inspection could be safely made by removing a portion of the wall,—an order was made for inspection, and (so far as was necessary) for making a driftway through the wall,—the plaintiff giving security to the extent of 500*l.* for indemnifying the defendants against any damage arising from the inspection.

(2) Under the Judicature Acts and Rules.

And it is provided generally, by Order L., Rule 3, of the Rules of the Supreme Court, 1883, that it shall be lawful for the court or a judge, upon the application of any party to an action, *and upon such terms as may be just*, to make any order for the inspection of any property, being the subject of the action, or as to which any question may arise therein ; and, for all or any of the purposes aforesaid, to authorise any person or persons to enter upon or into any land or building in the possession of any party to such action, and for all or any of the purposes aforesaid to authorise any samples to be taken, or any observation to be made, or experiment to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence. And upon this rule, LINDLEY, M.R., observed, that an order for inspection of the kind specified in the rule was so common in chancery that it was almost a matter of course,—subject only to this, namely, that if the defendants could suggest any method by which the inspection could be had without the plaintiffs seeing the whole of their mines, the inspection should be so limited (*m*).

(*l*) (1861), 30 L. J. Q. B. 98 ; and see *Ennor* v. *Barwell* (1860), 1 De G. F. & J. 529 ; *Cooper* v. *Ince Hall Colliery Co.*, W. N. (1876), 29.

(*m*) *Cooper* v. *Ince Hall Colliery Co.*, *supra*.

SECTION V.—*On the Damages Recoverable for Mining Injuries,—and, in particular, on the Measure of the Damages for Mining Trespasses.*

(i) Failure to sink pit,—damages for, measure of.

Neglect to sink pit,—damages for.

The damages recoverable for breach of contract to sink a pit on the lands of the plaintiff are the cost to the plaintiff of sinking the pit (*n*).

In *Hanson* v. *Boothman* (*o*), where the lease was of all the mines of coal which (at the date of the lease) had been or which (during the lease) should be *found* within specified lands ; and the lessee covenanted to forthwith sink for the coal, and (for breach of that covenant) to pay such damages as should be ascertained by arbitration,—and the lessee having failed for one whole year to commence sinking for the coal, an arbitrator had awarded 150*l.* as damages for the breach during such year, and had further awarded, that the lessee should proceed to sink, and should (while the breach of covenant continued) pay 200*l.* a year as and by way of damages for the breach during the second and each subsequent year ; and the lessee paid the 150*l.*, and proceeded during the second year to sink for the coal according to his covenant, but desisted upon the ground that there was *no coal fit to be worked*, the covenant (as he alleged) not obliging him to go on sinking in such a case,—the court intimated that (the covenant being of that qualified character) if the experiments on the lessee's part had been sufficient, there was no liability on the lessee to continue paying the 200*l.* per annum.

(ii.) Disturbance of mineral way-leave,—damages for, measure of.

Way-leave, disturbance of,—damages for.

Where A. was the lessee of the H. mines for fifty years, and was also the lessee (but under a different lessor) of the L. mines for thirty years (determinable) ; and under the latter lease, he had certain surface liberties which were available for working the H. mines as well as the L. mines ; and a railway company took compulsorily part of the surface overlying the H. mines, and thereby prevented A. from having (or from continuing to have) access from his H. mines to a certain canal ; and he was

(*n*) *Pell* v. *Shearman* (1855), 10 Exch. 766.

(*o*) (1810), 13 East, 22.

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therefore obliged to carry them by a more *circuitous* route over the surface overlying the L. mines, and that more circuitous route would not be available at all after the expiration or determination of the L. lease,—the court said, that the railway company must pay compensation for interfering with the old access to the canal, diminished by a consideration of the other (more circuitous and somewhat precarious) access over the L. surface which still remained available ; and the diminution in the compensation was to be ascertained, upon a due consideration of (1) the circuitousness and (2) the precariousness of the alternative route (*p*).

(iii.) Mining trespass,—damages for, measure of.

Mining trespass,—damages for :

In *Jegon* v. *Vivian* (*q*), where the defendants had wrongfully worked the plaintiff's coal, but the wrongful workings had been *inadvertent*,—the defendants honestly believing that their lease (which had in fact expired) was still continuing,—the damages given for the coal wrongfully taken was the fair market value thereof less all expenses of hewing and raising ; and in *Livingstone* v. *Rawyards* (*r*), where also the defendants had wrongfully but inadvertently worked the plaintiff's coal, and the coal in question was a small piece of landlocked coal which the plaintiff would never himself have gotten, the damages given for the coal wrongfully taken was the royalty paid by the defendants for their other (adjacent) coal,—that being (under the circumstances) a fair measure of the value to the plaintiff.

(1) Where trespass inadvertent ;

Rule at law, and rule in equity,—difference between;

On the other hand, in *Martin* v. *Porter* (*s*), where the coal had been wrongfully taken,—but whether fraudulently or inadvertently, did not appear,—the damages given were the value of the coal as chattels at the pit's mouth ; and no allowance was made for the expense of working the coal, the defendant's own wrongful act not entitling him (it was said) to any *mitigation* of the damages. And in *Wild* v. *Holt* (*t*), in an action of trespass for coal wrongfully dug and gotten, the rule in *Martin* v. *Porter* was again applied.

and reconciliation of the difference.

From what was said by the court, in *Hunter* v. *Gibbons* (*u*), it rather appears that the reconciliation of the cases is, that the damages in equity (being ascertained upon an account taken)

(*p*) *Bidder and North Staffs. Rail. Co., In re* (1878), 4 Q. B. D. 412.
(*q*) (1871), L. R. 6 Ch. App. 742.
(*r*) (1880), 5 App. Cas. 25.
(*s*) (1839), 5 Mee. & W. 352.
(*t*) (1842), 9 Mee. & W. 672.
(*u*) (1856), 1 H. & N. 459 ; 26 L. J. Exch. 1.

are different from the damages at law (which are simply for the trespass),—so that, at the present day, the distinction between trespass and account might still be material,—the measure of damages being different according as the action is trespass or is account.

Damages, for how many years recoverable, —for inadvertent trespass, or mistake ;

In *Brooksbank* v. *Smith* (*x*), the principle of equity, that, in cases of *fraud*, the statute of limitations runs only from the discovery of the fraud, was held to be applicable to cases of innocent *mistake* as well ; but that was an action to recover trust funds paid by mistake to the defendant, and it was only the remnant of the fund still *in specie* that was claimed to be recovered back ; and the decision, if applicable at all, to mistakes in mining trespasses, would be limited to the amount of the sale-proceeds (or profits) wrongfully received and still retained and remaining *in specie*, *semble*.

or for trespass under a wilful mistake.

In *Trotter* v. *Maclean* (*y*), which was an action for the wrongful taking of coal, the action was commenced on April 20th, 1878, and it appeared that the wrongful workings had commenced in October, 1871,—so that there were workings six years before action, and also workings (between October, 1871, and April, 1872,) for five or six months beyond these six years ; and upon the facts, the court was of opinion, that the wrongful workings up to July, 1872, had been conducted under a fair expectation of a lease of the mines being granted, and that the workings since July, 1872, had been conducted with the full knowledge that such lease would not be granted,—and under these circumstances, the court said,—(1) That the relief in respect of the six years between April 20th, 1872, and April 20th, 1878, must be granted ; (2) That the relief in respect of the workings between October, 1871, and April 20th, 1872, could only be granted (following *Dean* v. *Thwaite*) (*z*) indirectly,—that is to say, by holding all the workings to have been since April 20th, 1872, *unless so far as the defendants should prove that they had been before that date* ; and (3) That the milder rule for ascertaining the damages was applicable in respect of all the workings down to July, 1872, and that the severer rule was applicable to the workings, subsequent to July, 1872,—the milder rule being to allow the cost of severing the coal, and the severer rule being to disallow that cost,—the cost of bringing the coal to bank being in each case allowed.

(*x*) (1836), 2 You. & C. Exch. 58.
(*y*) (1879), 13 Ch. D. 574.
(*z*) (1855), 21 Beav. 621.

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(2) Where the trespass is fraudulent,—either (*a*) actually;

or (*b*) constructively.

In *Phillips* v. *Homfray* (*a*), where the defendants had trespassed on the plaintiff's coalfield, and had subsequently endeavoured (without disclosing the trespass) to purchase the coalfield; and after the purchase negotiations had fallen through, the defendants still further trespassed,—the damages given for the coal wrongfully taken was the market price or value thereof at the pit's mouth, the cost of carriage being allowed, but the cost of getting and severing being disallowed.

And in *Bulli Coal Co.* v. *Osborne* (*b*), where the defendant had for a series of years taken the plaintiff company's coal, furtively and by means of a secret underground passage, and generally under circumstances which made the trespass a wilful and deliberate trespass, amounting (in fact) to a fraudulent trespass,—the defendant was charged with the market value at the pit's mouth of all the coal worked and gotten without any allowance for the cost of working and getting.

DAMAGES, ITEMS OF.

The cost allowed under the heading of cost of bringing to bank, and (where that also is allowed) under the heading of cost of severance, was decided in *Re United Merthyr Collieries Co.* (*c*) to be the actual disbursements for wages, etc., etc.

DAMAGES, INTEREST ON.

And in such a case, interest, if claimed, will be (or may be) allowed on the amount of the damages,—computed at the rate of four per cent. per annum; for the action may be regarded (in equity) as an action for an account and payment (*d*),—which form of action is, for some purposes, better than the legal action of trespass for simple damages (*dd*).

CONSEQUENTIAL DAMAGE.

Damage may include consequential damage.

A trespasser may be liable, not only for the coal he has actually taken away, but also for the damages he has occasioned thereby (and otherwise) to the coal which is left in the mine, and to the mine generally,—as *e.g.*, for coal rendered unworkable by reason of the trespass and the subsequent operation of natural causes (*e*).

(*a*) (1871), L. R. 6 Ch. App. 770.
(*b*) [1899] A. C. 351.
(*c*) (1872), L. R. 15 Eq. 46.
(*d*) *Leeds* (*Duke*) v. *Amherst* (1846), 14 Sim. 357; 2 Phil. 117; *Phillips* v. *Homfray* (1890), 44 Ch. D. 694; [1892] 1 Ch. 465.
(*dd*) *Phillips* v. *Homfray* (1883), 24 Ch. D. 439.
(*e*) *Williams* v. *Raggett* (1877), 25 W. R. 874.

SURREPTITIOUS UNDERGROUND CARRIAGE.

Where an adjoining colliery owner carries his coal surreptitiously through the plaintiff's subsoil, the damages recoverable are a way-leave rent (*f*),—and the like principle for ascertaining the damages is applicable, where a miner tips the spoil and rubbish from his mine on the plaintiff's surface land (*g*); and in all such cases, it is not the value of the subsoil or surface to the plaintiff, but the value of it to the defendant that is regarded, —these being exceptions to the admitted general rule (*h*). But *nota bene*, the claim to way-leave rent in such cases is really and truly a claim to damages for a tort,—and the claim therefore dies with the person (*i*), unless and so far as it is kept alive by the 3 & 4 Will. 4 c. 42; and the claim for damages cannot (by waiver of the tort or otherwise) be converted into a claim for an account (*i*).

Damages,—may be measured by a way-leave rent.

MINERAL TRESPASSES, AND STATUTES OF LIMITATION.

Taking your neighbour's coal under circumstances which render the taking a stealing of the coal is (or amounts to) a fraudulent taking (*k*),—and therefore the statutes of limitations (six years) only run as from the time when the fraud was discovered or might (with due diligence) have been discovered (*l*); but where the coal wrongfully taken away is taken under circumstances negativing any active or wilful fraud in the taking, the six years were supposed to run as from the date of taking, even although the plaintiff was not aware of the trespass until the six years had expired (*m*). However, in *Bulli Coal Co.* v. *Osborne* (*mm*), where the workings were constructively fraudulent, and had extended over a series of years before they were discovered, the court said, that the plaintiff company was not bound by any statute of limitations,—for that (in the case of such a fraudulent taking), *so long as there was no laches on the part of the defrauded party*, no time was a bar to his action; and that was so, although

The limit of time runs,—(1) from *inadvertent* wrongful taking; and (2) from discovery of *fraudulent* wrongful taking.

(*f*) *Martin* v. *Porter* (1839), 5 Mee. & W. 351; *Jegon* v. *Vivian* (1871), L. R. 6 Ch. App. 742; *Phillips* v. *Homfray* (1871), L. R. 6 Ch. App. 770.

(*g*) *Whitwham* v. *Westminster Brymbo Co.*, [1896] 2 Ch. 538.

(*h*) *Jones* v. *Gooday* (1841), 8 Mee. & W. 146.

(*i*) *Phillips* v. *Homfray* (1883), 24 Ch. D. 439

(*k*) *Ecclesiastical Commissioners* v. *North Eastern Rail. Co.* (1877), 4 Ch. D. 845, at pp. 858, 860.

(*l*) *Ibid.*; *Gibbs* v. *Guild* (1882), 9 Q. B. D. 59; *Betjemann* v. *Betjemann*, [1895] 2 Ch. 474.

(*m*) *Astley Colliery Co.* v. *Tyldesley Colliery Co.* (1899), 68 L. J. Q. B. 252; and see *Rains* v. *Buxton* (1880), 14 Ch. D. 537.

(*mm*) [1899] A. C. 351.

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the defendant wrongdoer should not have taken any active measures to prevent the discovery of the fraud: Which decision appears to have now settled the law, the earlier decisions or *dicta* (and in particular those in *Dean* v. *Thwaite*, *supra*, *Ecclesiastical Commissioners* v. *North Eastern Rail. Co.*, *supra*, and *Trotter* v. *Maclean*, *supra*), so far as they touched upon this point, not having been either sufficiently definite or of sufficient authority.

(iv.) Subsidences, etc.

ACTS RIGHTFUL AND ACTS WRONGFUL, DISTINGUISHED.

In all cases, where a wrong has been committed, the time will run from the commission (*n*),—*e.g.*, in all cases of working out of bounds; but if the act is one that imports no wrong in itself, and the act *may* never be productive of damage, then the statute will begin to run only from the time of the actual damage (*o*).

FLOODING,—CONSEQUENCE OF RIGHTFUL ACT.

Limit of *three* months from "*fact committed*,"—continuance of fact.

In *Whitehouse* v. *Fellowes* (*p*), the plaintiff sued for damage to his colliery caused by flooding; and the defendants were answerable for the flooding, they having (under their powers as turnpike trustees) lawfully constructed the covered roadside drain from which (through the gratings in it) the flood-water came,—such drain having been originally insufficient (and having continued insufficient) in times of heavy rain to carry off all the water: And the defendants' only defence was that, under their Acts, all actions against them were required to be commenced *within three months after the* "*fact committed*,"—and the drain had been constructed much more than three months before action commenced: But the court held, that the continuing insufficiency, coupled with the damage arising through the flooding therefrom, was the "*fact committed*,"—*i.e.*, the cause of action sued on, and was within the three months' limitation.

SUBSIDENCE,—CONSEQUENCE OF RIGHTFUL ACT.

Limit of *six* months from "*excavation*,"

And similarly, in *Crumbie* v. *Wallsend Local Board* (*q*), which was an action limited (as against the defendant authority) to a

(*n*) *Short* v. *MacCarthy* (1820), 3 B. & Ald. 628; *Smith* v. *Fox* (1848), 6 Hare, 386; 17 L. J. (N.S.) Ch. 170.

(*o*) *Roberts* v. *Read* (1812), 16 East. 215.

(*p*) (1861), 10 C. B. (N.S.) 765.

(*q*) [1891] 1 Q. B. 503.

period of six months after the cause of action had arisen, it appearing that the defendants had lawfully excavated in a street, and had afterwards improperly filled in the excavation,—whereby the old support was not fully restored, and in consequence, the plaintiff's houses had subsided and been damaged,—the subsidence and damage first arising or showing more than six months before the action was commenced, but continuing up to the date of the commencement of the action,—the court held, that the plaintiff was entitled to recover in respect of the continuing damage from the then continuing subsidence, so far as such damage accrued within the six months.

—support continuing unrestored.

SUCCESSIVE SUBSIDENCES,—SUCCESSIVE DAMAGES FOR.

In *Bonomi* v. *Backhouse* (*r*), where the plaintiffs were the owners of an ancient house, and the defendant had worked his coal mines both below it and within a distance of 280 yards from it; and the house was injured by the latter workings, but the injury did not show (or, in fact, occur) until more than six years afterwards,—the court held, that the cause of action did not lie, until the plaintiffs' ordinary enjoyment of their land was interfered with, and therefore that the action was brought in time.

Mining subsidences generally,—action, right of, when complete.

In *Nicklin* v. *Williams* (*s*), where the plaintiff sued in respect of damage sustained to his surface land and the houses thereon through a subsidence caused by the defendant's withdrawal of the subjacent and adjacent natural support to which the plaintiff was entitled, it appeared that the plaintiff had been already compensated by the defendant for the damage under a compromise arrived at in a previous action in which he had sued *as for an injury to his right of support*; and the court held, that, under such circumstances, *the injury to the right of support* had been satisfied,—so that, *in respect of that injury*, the plaintiff could not recover any subsequently accrued damage which was recoverable in his former action as prospective damage. The subsequent cases, however, have now established, that the *prospective* damage is not recoverable in such an action,—that is to say, that it is not recoverable until it has become actual damage,—the reason given for the latter view being, that the mere withdrawal of the support is not an injury,—that is to say, is

Mere right of support,—damage to;

(*r*) (1858), El. B. & E. 622; 34 L. J. Q. B. 181.

(*s*) (1854), 10 Exch. 259.

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not an actionable injury, until some damage has arisen from its withdrawal: Consequently, in each action the plaintiff now recovers only the damage then already accrued, and he is entitled to bring a series of actions successively for each successively accruing damage.

distinguished from damage generally from subsidence.

In *Darley Main Colliery* v. *Mitchell* (*t*), where it appeared, that the coal company had worked coal under and adjoining Mitchell's land, and had compensated him for the subsidence occasioned thereby; and that the company had not afterwards worked any coal, but neither had they substituted any other (artificial) support for the natural support they had taken away; nor had they in any way strengthened the support which remained; and it further appeared, that an adjoining coal-owner had worked the adjoining coal,—whereby the remaining underground support to Mitchell's land became insufficient, and a further subsidence occurred, with a further damage,—the court held, that the coal company was liable to pay for that further damage; and, apparently, the adjoining owner was not liable for it,—the withdrawal of the subjacent (natural) support to Mitchell's land not imposing upon such adjoining owner any other or higher duty towards Mitchell than the duty (if any) which he was under before, nor imposing upon him any other or higher duty towards the coal company than the duty (if any) which he was under before.

SUBSIDENCE,—WHERE ARTIFICIAL SUPPORT SUBSTITUTED.

Artificial support,—(1) Where sufficient at first;

Where mines have been worked, and sufficient of the mineral has been left for the support of the surface,—the duty of the mineral-owner is discharged; and if a subsidence should afterwards happen,—by, *e.g.*, the support crumbling away from natural causes,—the damage would not, in such a case, be the consequence of any breach of duty, and therefore would not be actionable. But, *semble*, if the whole mineral had been gotten, and artificial support substituted for the natural support, there would be a continuing duty on the mineral-owner to maintain in sufficiency the substituted artificial support; and for the damage resulting from any subsidence occasioned through a breach of that continuing duty, there would be a right of action.

(*t*) (1886), 11 App. Cas. 127.

SUBSIDENCE,—WHERE NO ARTIFICIAL SUPPORT SUBSTITUTED.

Where the owner of subjacent mines (*scil.*, being an owner who is not entitled to cause a subsidence) works the subjacent mines and thereby causes a subsidence to the surface and to buildings thereon, and he satisfies the damage so caused, and does not further work the subjacent mines,—but leaves the support weakened, not substituting any artificial support in lieu of the support which he has withdrawn; he may be (and he will be) liable for any fresh damage subsequently arising, even where the occurence of such fresh damage is proximately attributable to a third party's working of the adjacent minerals (*u*), —*scil.*, where the adjacent workings would not have occasioned the fresh damage if the subjacent support had not been first weakened.

SUBSIDENCE,—WHO LIABLE FOR, WHEN A CHANGE OF OWNERSHIP.

Subsidence,—liability for, where the mineral ownership has changed.

In *Greenwell* v. *Low Beechburn Colliery Co.* (*x*), where the plaintiff's lands with the houses thereon had subsided through the coal having been worked out underneath and adjacent to them; but it appeared, that the coal-workings had all been completed before the defendant company's interest in the colliery had commenced,—that is to say, by certain predecessors in title of the defendant company,—the court held, that the defendant company were not liable, merely because the subsidence happened in their time, and that they were not liable for neglecting to substitute other support to the plaintiff's houses. It appeared also in that case, that, in the deed whereby the surface was originally severed from the mines, the right to work the mines was subjected to the liability of paying compensation for any damage done to the surface; but in the view of the court, the damage thereby provided for was damage occasioned otherwise than through a subsidence,—so that the decision did not turn on that compensation clause.

It was suggested in *Greenwell* v. *Low Beechburn Colliery Co.* (*y*), that a mine-owner who has no right to subside the surface, and who yet excavates the minerals in such a manner

(*u*) *Darley Main Co.* v. *Mitchell* (1886), 11 App. Cas. 127.

(*x*) [1897] 2 Q. B. 165.

(*y*) *Ibid.*

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as that subsidence will inevitably happen unless other (artificial) support be substituted for the natural support which has been withdrawn, will be answerable for the damage happening from the subsidence when such damage does happen, although he may in the meanwhile have parted with the mineral field to others, and so have deprived himself of the means of preventing the subsidence ; but the only decision in the case was what is above stated, namely, simply this, that the lessee of the mines who had taken no part in the excavation was not liable for the damage, merely because he had not prevented the subsidence by the substitution of other support.

RIGHT AND DUTY TO SUPPORT OR MAINTAIN.

Right of the endangered surface owner,—to enter and strengthen the artificial support.

In *Pomfret* v. *Rycroft* (*z*), the defendant had demised to the plaintiff a dwelling-house, together with the use (in common with others) of a pump on an adjoining piece of land ; and had failed to keep the pump in repair,—whereby the plaintiff sustained damage (*scil.*, in not having the use of the pump), and he sued the defendant for the damage ; but the court held the defendant not liable,—because it was a mere *non-feasance* on defendant's part, in permitting the pump to be out of repair ; and the defendant not being liable to do the repairs, the plaintiff might himself have entered (without any trespass) on the adjoining piece of land and executed the repairs. But the defendant might, in such a case, have been liable, either by express covenant on his part to do the repairs, or even (*semble*) by any custom of the locality obliging him to do them (*a*) ; and the defendant would, of course, be liable for any positive *misfeasance*. Also, in *Colebeck* v. *Girdlers Co.* (*b*), where the plaintiff was the lessee of a house (used as a boarding house) under a lease from the defendants, and the house was (in part) supported (as to its end wall) by the wall of an adjoining house (also the property of the defendants but in lease to X.),—and the plaintiff had covenanted to repair the house demised to him ; and the plaintiff's wall, where it was supported by the adjoining wall, became insecure through the supporting wall splitting and bulging under it,—and he claimed damages for the loss thereby occasioned, —the court said, that the defendants' default to maintain the supporting wall might be an answer to any action by them

(*z*) (1669), 1 Saund. 320.
(*a*) F. N. B. 127 b ; *Tenant* v. *Goldwin* (1704), 1 Salk. 361.
(*b*) (1876), 1 Q. B. D. 234.

against the plaintiff for breach of his covenant to repair; but said (and also decided), that such default did not entitle the plaintiff to recover the damages which he claimed, *there being no express covenant on the defendants' part to maintain the supporting wall, and the law not implying any such covenant*; and the defendants had done no act to weaken the support, but had (on the contrary) taken steps to strengthen the supporting wall so soon as the splitting and bulging thereof had become known to them; and the court said, that the plaintiff might also (without a trespass) have strengthened the supporting wall (*c*), being entitled to do whatever the defendants could lawfully do, in that particular.

ACT IN ITSELF RIGHTFUL MAY (FOR CERTAIN PURPOSES) BE WRONGFUL.

Support, temporary withdrawal of,—interim precautions needed.

The withdrawal of support not being wrongful in itself but becoming wrongful on the subsidence happening,—it is (for some purposes) to be considered wrongful in itself. Thus, in *Bower* v. *Peate* (*d*), where the plaintiff and defendant were respectively owners of adjoining houses, which (and the sites thereof) materially supported each other; and the defendant (employing for the purpose a skilled contractor) pulled down his own house in order to rebuild it, and excavated for a better foundation; and by reason of such excavation, he subsided the plaintiff's house,—the court said he was liable, the interim withdrawal of the support being unlawful, and the defendant therefore not being entitled to shelter himself from liability under the plea of his employment of a skilled contractor:—"It is true the withdrawal of the soil to the support of which the adjoining land is entitled is not in itself wrongful, but becomes so only when the subsidence results (*e*); but if the effectual means of preventing the subsidence fail to be applied, and the subsidence results, then the withdrawal becomes wrongful in itself." But in such a case, the contractor is also liable; and he may be sued jointly with the owner who employs him (*f*).

Flooding,—prospective danger of.

Also, in *Johnstone* v. *Crompton* (*g*), where there was a lease of the surface, excepting the minerals, and with liberty to get them

(*c*) *Pomfret* v. *Rycroft* (1609), 1 Saund. 322.
(*d*) (1876), 1 Q. B. D. 321.
(*e*) *Bonomi* v. *Backhouse* (1858), 9 H. L. Cas. 503.
(*f*) *Dalton* v. *Angus* (1881), 6 App. Cas. 740.
(*g*) [1899] 2 Ch. 190.

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otherwise than by entering on the surface ; and the defendant (the lessee of the surface, or his assignee) was boring for water ; and, in so doing, he was obliged, of course, to pass through divers mineral substances (portion of the soil), such as rock, narrow bands of coal, etc., etc. ; and the plaintiff (the original lessor or his assignee of the excepted minerals) claimed to restrain the further borings for water,—alleging that the borings (so far as regards the mineral substances) were a trespass, although without appreciable damage to those mineral substances themselves ; and also alleging, that, if the borings were continued and water should be found, the liberation of the water would very seriously damage the excepted minerals,—the court restrained the further boring,—*scil.*, because of the prospective flooding, or danger of flooding, although ostensibly for the nominal trespass to the excepted mines.

CHAPTER XIV.

ON THE RATING OF MINES AND QUARRIES.

(i.) The poor rate.

"Occupier," Rateability of.

"Occupier" —the person to be rated.

By the statute 43 Eliz. c. 2, commonly called the Poor Law Act (and which is now to be referred to as "The Poor Relief Act, 1601"), competent sums of money for the relief of the poor were directed to be raised by taxation of (among other things or persons) every "occupier" of *coal mines* in the parish; and coal mines having been expressly made liable to the poor rate, other mines were by implication held to be exempted (*a*); and this exemption continued until April 6th, 1875, when the 37 & 38 Vict. c. 54 (commonly called the Rating Act, 1874), abolished it.

As between lessors and leesees; and licensors and licensees,—who is the "occupier."

As between the lessor and the lessee of a mine, the lessee is the occupier for the purposes of the rating Acts; but as between the owner of a mine and his licensee,—a license to mine conferring, in general, no estate in the mines, but a mere right or privilege, and the license being also in general non-exclusive,—the licensee is not, in general, the occupier (*b*), but the owner and licensor usually is the occupier, and is rateable accordingly (*c*). At the same time, a license to mine may be an exclusive license, conferring upon the licensee the sole and exclusive right of occupation of the mine; and, in such latter case, the licensee would be rateable (*d*),—in the same manner that the grantee of an exclusive right of way-leave would in general be rateable (*e*), although the grantee of a mere way-leave (*f*), as of a mere easement (*g*), would not be rateable.

(*a*) *Lead Smelting Co.* v. *Richardson* (1763), 3 Burr. 1341; *Rex* v. *Sedgeley Inhabitants* (1831), 2 B. & Ad. 65; *Crawshay* v. *Morgan* (1871), L. R. 5 H. L. 304.

(*b*) *Rex* v. *St. Austell* (1822), 5 B. & Ald. 693; *Rex* v. *Trent and Mersey Navigation Co.* (1834), 4 B. & C. 57.

(*c*) *Rex* v. *Tremayne* (1832), 5 B. & Ad. 162.

(*d*) *Kittow* v. *Liskeard Union* (1874), L. R. 10 Q. B. 7.

(*e*) *Rex* v. *Bell* (1798), 7 T. R. 598; *Greenwich Tramways* v. *Greenwich Overseers* (1873), L. R. 9 Q. B. 9.

(*f*) *Rex* v. *Jolliffe* (1823), 2 T. R. 90.

(*g*) *Rex* v. *Nicholson* (1810), 12 East, 330; *Rex* v. *Eyre* (1810), *ib.* 416; *Rex* v. *Trent and Mersey Navigation Co.*, *supra*.

However, in Ireland, a licensee or the grantee of an easement is, by the Irish Act (1 & 2 Vict. c. 54), s. 63, expressly made rateable to the poor,—and that apparently whether or not a right of soil passes to the licensee.

"OCCUPATION," BENEFICIAL AND EXCLUSIVE.

An occupier is rated in respect of his *occupation*, and his occupation must (for this purpose) be both beneficial (*h*) and exclusive (*i*).

Beneficial occupation,—what is.

And, Firstly, as regards *beneficial* occupation, it has been said that the true test of beneficial occupation is to ascertain whether the occupation is of value; and therefore an occupation may be "*beneficial*" for the purposes of the poor rate, although it is unattended with commercial profit, or even with the possibility of such profit (*k*). In other words, it is the "benefits" from (or incident to) the occupation that are to be considered in arriving at an estimate of the value for poor rate purposes; and these benefits may exist, although no profits (*scil.*, commercial profits) accrue in respect thereof, and whether these profits (when they do accrue) are equal to, or greater than, or less than, the benefits from the occupation (*l*). But an occupation which cannot (or which for the time being is not) beneficial within the meaning of the poor law Acts is, of course, exempt (or for the time being exempt) from the rate; but it is difficult to conceive of any land or other hereditament which is in the actual occupation of anyone, the occupation of which has not some *value*, however devoid the occupation may be of *profit*. Possibly there may, by force of statute, be a "sterile" occupation (*m*); but it has been suggested, that it might have been better if, in such a case, the statute had simply enacted, that the property should be exempt from the poor rate (*n*), that being evidently the true nature, and true effect, of this species of sterility.

(*h*) *Bristol Poor* v. *Wait* (1836), 5 Ad. & E. 1; *Jones* v. *Mersey Docks* (1864), 11 H. L. Cas. 443.

(*i*) *Allan* v. *Liverpool Overseers* (1874), L. R. 9 Q. B. 180.

(*k*) *Jones* v. *Mersey Docks* (1864), 11 H. L. Cas. 443; *R.* v. *London School Board* (1886), 17 Q. B. D. 738; *Burton Corporation* v. *Burton Overseers* (1889), 24 Q. B. D. 197; *London County Council* v. *Erith Churchwardens*, [1893] A. C. 562.

(*l*) *R.* v. *Westbrook* (1847), 10 Q. B. 178; *R.* v. *Rhymney Rail. Co.* (1869), L. R. 4 Q. B. 276.

(*m*) *Mersey Docks* v. *Llaneilian* (1885), 14 Q. B. D. 770; *Owen's College* v. *Chorlton* (1887), 18 Q. B. D. 403; *Hull Docks* v. *Sculcoates Union* (1894), 71 L. T. 642.

(*n*) Boyle on Rating, 2nd ed., pp. 75—6.

Exclusive occupation,—what is.

Secondly, the beneficial occupation upon which the liability to the poor rate is based, must also be an *exclusive* occupation (*o*); and it is for this reason, that non-exclusive licenses and mere easements (such as non-exclusive way-leaves) (*p*) are not rateable—meaning that the licensee or grantee of the easement is not rateable,—to the poor rate in respect thereof (*q*),—although it is otherwise if the right granted, whether in the nature of a license or of an easement, confers a right to the exclusive possession or enjoyment of the land covered by the license or easement (*r*). Thus, in *Rex* v. *Trent and Mersey Navigation Co.* (*s*)—where certain proprietors of limestone quarries had agreed to deliver yearly to the defendant company such a quantity of stone as the company should yearly direct; and had also agreed that, in case of their neglect or refusal to do so, it might be lawful for the company to enter and take away the stone; and the proprietors made default; and the company thereupon entered and worked the stone, and they (the company) were accordingly rated as occupiers of the quarries—the question which arose was, whether there had been an *exclusive* possession by the company—that is to say, an *occupation* by the company sufficient for the purposes of the statute 43 Eliz. c. 2; and the court was of opinion, that there had not been an exclusive occupation by the company—*scil.*, because there was nothing in the contract to prevent the several proprietors from giving to others also the privilege of getting the stone. On the other hand, in *Kittow* v. *Liskeard Union* (*t*), where the proprietors had granted to certain trustees for a cost-book mining company or partnership full liberty, license, and power (within defined limits) to dig shafts, etc., and to work and raise and make saleable and sell the minerals, and to erect sheds, etc.,—the court held, that the partners in the mining company were the sole and exclusive occupiers of the land within the defined limits in which these shafts, etc., sheds, etc., were, and so were rateable in respect thereof to the poor rate.

Residence,—necessity for.

It is not necessary for the purposes of this chapter to pursue the subject of rateability (under the 43 Eliz. c. 2.) in respect of *inhabitancy* within the parish; and it will be sufficient therefore

(*o*) *Allan* v. *Liverpool Overseers*, (1874), L. R. 9 Q. B. 180; *Rochdale Canal Co.* v. *Brewster*, [1894] 2 Q. B. 852.
(*p*) *Rex* v. *Jolliffe* (1823), 2 T. R. 90.
(*q*) *Southport Corporation* v. *Ormskirk*, [1894] 1 Q. B. 196.
(*r*) *Halkyn District Drainage Co.* v. *Holywell Union* (1894), 71 L. T. 818.
(*s*) (1834), 4 B. & C. 57.
(*t*) (1874), L. R. 10 Q. B. 7.

to remark, that every rateable inhabitant must be actually resident within the parish in which he is rated; and that a resident partner will not render a non-resident partner liable for his share (*u*); also, that a residence will only be constituted, where the person eats, drinks, and sleeps,—or where his family, or his servants, eat, drink, and sleep (*x*).

ASSESSMENT OF RATE, MODE OF.

"Net annual value,"—definition of.

By the Parochial Assessment Act, 1836 (*y*), an Act passed for establishing one uniform mode of rating throughout England and Wales (exclusive of the Metropolis) (*z*), it is enacted, that no rate for the relief of the poor shall be of any force which shall not be made upon an estimate of the "*net annual value*" of the property rated; and the net annual value is defined by the Act as the rent at which the property might reasonably be expected to let *from year to year*, free of all usual tenant's rates and taxes, and tithe commutation rent-charge (if any),—deducting therefrom the probable average annual cost of the repairs, insurance, and other expenses necessary to maintain the premises in a state to command such rent. And by the Union Assessment Committee Act, 1862 (*a*), s. 15, the "*gross estimated rental*" is defined as the rent at which the premises might reasonably be expected to let from year to year, free of all usual tenant's rates and taxes, and tithe commutation rent-charge, if any. And, accordingly, a coal mine must be rated at *such a sum as it would let for from time to time by the year*, without regard

"Gross estimated rental,"—definition of.

(*u*) *Rex* v. *Nicholson* (1810), 12 East, 342, *per* Le Blanc, J.; *Rex* v. *The Inhabitants of North Curry* (1825), 4 B. & C. 953; 7 D. & R. 424.

(*x*) *Rex* v. *Gosse* (1827), 7 B. & C. 60; 9 D. & R. 759.

(*y*) 6 & 7 Will. 4, c. 96.

(*z*) As regards the metropolis (and the unions and parishes which for Poor Law purposes are to be deemed to be within the Metropolis), it is provided by the Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67), s. 4, that the term "gross value" shall mean the annual rent which a tenant might *reasonably* be expected, *taking one year with another*, to pay for the property, if the tenant undertook to pay all the usual tenant's rates and taxes (including the tithe commutation rent-charge (if any)), and if the landlord undertook to bear the cost of the repairs and insurance and the other expenses necessary to maintain the premises in a state to command that rent; and the term "*rateable value*" is to mean the gross value aforesaid, after deducting therefrom the probable annual *average* cost of the repairs and insurance aforesaid, and the other expenses aforesaid (*scil.*, these other expenses being also, of course, averaged); and a valuation list (to last for five years, commencing with the 6th April next following the date of making it) is to be prepared; and (by s. 45) the gross and rateable values in such list specified are to be accepted for the purposes of (among other rates) the Poor Rate; and such gross value is also made the basis of assessing the House Tax, and also for assessing the Income Tax or Property Tax—*scil.*, within the Metropolis (and such unions and parishes as aforesaid).

(*a*) 25 & 26 Vict. c. 103; amended by the 27 & 28 Vict. c. 39.

to, or without any proximate regard to, the annual profits of the colliery, and also without reference to the money originally expended in the acquisition of the colliery (*b*) ; and the actual rent paid or payable is, at the most, only evidence of (and is not, in general, the criterion of) the annual value for rating purposes (*c*) ; and as regards Ireland, the Act 1 & 2 Vict. c. 56, s. 64, adopts the same basis of assessment.

HYPOTHETICAL YEARLY RENT.

"Hypothetical yearly rent,"—not a "fancy rent";

The phrase "hypothetical tenant" signifies not the actual tenant as such but the actual tenant regarded as *competing* with other possible (and likely) tenants of the same property (*d*), each competitor being supposed to offer only such a rent for the tenement as *fairly represents its value as a tenement in its then existing condition* at the date of the supposed competition ; and such fair rent is to be distinguished from what has been sometimes called a "fancy rent," being a rent paid for the advantages of the occupation proper *plus* a rent for other (and adventitious) advantages beyond (*e*) ; prospective value also is excluded (or assumed to be excluded) in the competition (*f*).

But a competitive rent, as between or among all likely tenants.

The question to be asked in all cases, with a view to ascertaining the basis of value (or value for assessment purposes), is this :—What rent would a hypothetical yearly tenant give for the colliery ? (*g*)—this hypothetical letting value being that prescribed by the Parochial Assessment Act, 1836, and having been universally accepted as the only fair criterion (of universal application) that could have been adopted. And although the rate is only upon the value of the occupation of the tenement, that is to say, is not upon the trade profits made by the tenant (*h*), still the rate is to be always assessed on the *existing* value at the time of the rate, whether such value has been enhanced, or has deteriorated, since the last previous rate (*i*) ; and incidentally, therefore, and to some extent, the rateable value may depend upon the trade carried on upon the rateable premises. For example, a house may be valued at 20*l.* a year ; and yet, when converted

(*b*) *Rex* v. *Attwood* (1827), 4 B. & C. 277.
(*c*) *Rex* v. *Skingle* (1798), 7 T. R. 549 ; *Rex* v. *Bridgewater Trustees* (1829), 9 B. & C. 68.
(*d*) *R.* v. *London School Board* (1886), 17 Q. B. D. 738.
(*e*) *Ibid.*
(*f*) *Tyne Coal Co.* v. *Wallsend* (1877), 46 L. J. M. C. 185.
(*g*) *R.* v. *West Middlesex Water Works* (1859), E. & E. 716.
(*h*) *R.* v. *Grand Junction Rail. Co.* (1844), 4 Q. B. 18.
(*i*) *Rex* v. *Mast* (1795), 6 T. R. 154 ; *R.* v. *Wells* (1867), L. R. 2 Q. B. 542 ; *R.* v. *Westbrook* (1847), 10 Q. B. 178 ; *Tyne Coal Co.* v. *Wallsend* (1877), 46 L. J. M. C. 185.

into (and used as) a weighing-machine house, it might be fairly and justly valued at 40*l.* or more, *i.e.*, by reason of the enhanced value of the tenement as such (*k*). Also, the value may be enhanced by purely natural causes, *e.g.*, by reason of a spring of water rising in it (*l*), or by reason of any other special rights incident to the tenement as a tenement (*m*). But, of course, the value may not be diminished (or, *semble*, enhanced) artificially, at the will of the lessor and lessee (*n*).

"DEDUCTIONS" FROM ASSESSMENT.

"Deductions,"—what are, and what are not.

The hypothetical yearly rent is the "gross estimated rental" ascertained upon the assumption (seldom or never true), that the landlord pays all the usual tenant's rates and taxes, and the tithe commutation rent-charge (if any) ; and it follows, that none of these are "*deductions*" properly so called,—*scil.*, because even where (as is usually the case) the tenant himself pays them, they are supposed to have been already eliminated in arriving at the "gross estimated rental," or otherwise to be non-existent. And "*deductions*" properly so called are the sums which represent (1) the cost of repairs; (2) the cost of insurance; and (3) the expenses necessary to maintain the premises in a condition to command the hypothetical rent,—all such costs and expenses being for this purpose ascertained, for any particular rating year, by an estimate of the probable annual average thereof ; and that average is the deduction appointed by the statute 6 & 7 Will. 4, c. 96 ; and when that deduction is made from the "gross estimated rental," there is left the "*net annual value*," otherwise the "*rateable value*" within the meaning of the Act. But it is to be observed, that where the tenant pays (and in general he does pay) the Land Tax, or any other usual landlord's tax (not being Income or Property Tax), the gross estimated rental must be first increased by the amount of such payments, before the authorised statutory deduction or deductions begin to be made (*o*).

(*k*) *Rex* v. *St. Nicholas* (1783), 1 T. R. 723, n. ; *Newmarket Rail. Co.* v. *St. Andrews* (1854), 3 El. & Bl. 94 ; *R.* v. *Grand Junction Rail. Co.*, *supra* ; *Cartwright* v. *Sculcoates Union*, [1899] 1 Q. B. 667.

(*l*) *Rex* v. *New River Co.* (the *Amwell Spring Case*) (1813), 1 M. & S. 503 ; *Rex* v. *Miller* (1777), Cowp. 619.

(*m*) *The Soke Mill Case* (referred to in *Rex* v. *Bradford*) (1815), 4 M. & S. 317.

(*n*) *R.* v. *Rhymney Rail. Co.* (1869), L. R. 4 Q. B. 276 ; *Sunderland* v. *Sunderland* (1865), 18 C. B. (N.S.) 531.

(*o*) *R.* v. *Goodchild* (1858), 27 L. J. M. C. 233 ; *Dobbs* v. *Grand Junction Waterworks* (1883), 9 App. Cas. 49 ; *Rose* v. *Watson*, [1894] 2 Q. B. 90.

RENEWALS AND REBUILDINGS,—AVERAGE ANNUAL ALLOWANCE FOR.

Estimate of annual average cost.

The deduction on account of repairs is not, of course, the cost of the actual repairs in any year, but is the probable annual average cost of the repairs spread over a number of years (*p*).

Renewals,—allowance for.

The deductions authorised by the statute will, in general, include the cost of "*renewals*" (in the case of rateable plant and machinery), and the cost of "*rebuilding*" or "*reconstruction*" (in the case of houses or buildings),—*scil.*, the probable annual average cost of such renewals and rebuilding or reconstruction, as represented by a "*sinking fund*" (*q*); but no such deduction, as for a sinking fund, is permitted in the case of a mine, or a brickfield, or chalk-pit (*r*), in respect of their exhaustion,—*scil.*, because they go out of rating altogether as such, when exhausted. And as regards the *initial* expense of the plant and machinery of a colliery (in other words, the initial expense of planting the mine),—and as regards also the *initial* expense of winning the coal and generally of opening the mine,—that initial expense has been treated exactly like the expense of building a house and completing it as a residence (*s*); and, therefore, just as the house is rateable without any deduction of the initial cost of building it, so also the colliery or mine is rateable to the poor rate without any deduction first made (and without any regard to) the initial outlay or expenditure incurred in opening it and in planting it (*t*). But, of course, the cost of the *subsequent* maintenance of the colliery as such, and of keeping open the mine, would be a *deduction* (*u*); and as regards mines in Ireland, the Irish Act (1 & 2 Vict. c. 56), s. 63 exempts them from all rateability until the expiration of seven years after they have been first opened or (after a *bonâ fide* abandonment) re-opened.

Initial cost, and subsequent *maintenance* cost, distinguished.

COLLIERY, AND COLLIERY WORKS,—ASSESSMENT OF.

Colliery,—what included in assessment of.

A colliery includes, of course, not only the mine, but also the colliery works and plant. And in assessing the colliery,

(*p*) *R.* v. *Hull Dock Co.* (1816), 5 M. & S. 394.
(*q*) *R.* v. *Wells* (1867), L. R. 2 Q. B. 542.
(*r*) *Rex* v. *Attwood* (1827), 6 B. & C. 267; *R.* v. *Westbrook* (1847), 10 Q. B. 178.
(*s*) *Rex* v. *Attwood* (1827), 6 B. & C. 277.
(*t*) *Ibid.*
(*u*) *Rex* v. *Tomlinson* (1829), 9 B. & C. 163; *R.* v. *Wells* (1867), L. R. 2 Q. B. 542.

the improved annual value of the property resulting from the erection of the colliery works is, of course, to be included, that is to say:—You will assess the mine itself, and also all the machinery and railway, or tramways, buildings, etc., etc., used for the purposes of carrying on the business of the colliery,—everything, in short, which can be considered to form part of the colliery (*x*); and this is, because if the owner of the colliery had himself occupied it, he would have been rated according to the improved value of the tenement; and the lessee, being in the occupation, is liable exactly as the landlord, if in occupation, would have been.

Works,—incidental to colliery.

As regards iron works, smelting works, cement works, and the like, these have more or less an independent existence, apart from the mine or pit where the iron-ore or chalk is gotten or raised; and at a time, therefore, when the iron-ore mine or other mine was itself exempt from all liability to the poor rate, these works were not exempt (*y*),—save only as regards the plant and machinery which were necessarily incident to working the mine itself (*z*).

PLANT AND MACHINERY OF MINE.

Plant and machinery,—of coal mine;

Since the year 1840, personal property ceased to be rateable to the poor rate (*a*); but the plant and machinery of a mine did not therefore cease to be rateable (*b*),—the reason being, that such plant and machinery, while in use in the mine or at the works, were parcel of the tenement itself, the occupation of which involved the liability to be rated, and (as being parcel of the tenement) they gave it an enhanced or improved value (*c*).

and of incidental works.

And as regards the plant and machinery in an iron-ore mine, or other mine which was exempt under the statute 43 Eliz. c. 2, it may be said, that while such plant and machinery was exempt as being deemed necessarily incidental to the exempted mine itself, and as being (so far as it was) in a manner part

(*x*) *Rex* v. *Bilston* (1826), 5 B. & C. 581; *Rex* v. *Lord Granville* (1829), 9 B. & C. 188; *R.* v. *Guest* (1838), 7 A. & E. 951.

(*y*) *R.* v. *Guest* (1838), 7 A. & E. 951.

(*z*) *Rex* v. *Bilston* (1826), 5 B. & C. 851.

(*a*) 3 & 4 Vict. c. 89; *R.* v. *Lumsdaine* (1838), 10 A. & E. 157.

(*b*) *R.* v. *Southampton Dock Co.* (1851), 14 Q. B. D. 587; *R.* v. *North Staffordshire Rail. Co.* (1860), 3 El. & El. 392; *R.* v. *Lee* (1866), L. R. 1 Q. B. 241; *Tyne Boiler Co.* v. *Tynemouth* (1886), 18 Q. B. D. 81.

(*c*) *Rex* v. *St. Nicholas* (1783), 1 T. R. 723; *Rex* v. *Mast* (1795), 7 T. R. 154; *Rex* v. *Granville* (1829), 9 B. & C. 188; *Laing* v. *Bishopwearmouth* (1878), 3 Q. B. D. 299.

and parcel of that exempted mine (*d*), still that exemption did not extend very far. Thus, in *Talargoch Lead Mining Co.* v. *St. Asaph Union* (*Guardians*) (*e*)—where the appellants, for the purpose of working the machinery connected with a lead mine, diverted a stream from its natural course, paying the owners of the stream for such diversion, and paying also certain small sums for the occupation of the land by the watercourse; and the watercourse was about a mile and a half in length, and was partly open and partly tunnelled, and for about 350 yards was carried in pipes—the appellants were held rateable to the poor rate in respect of their occupation of the watercourse because the value of the land was enhanced thereby; and the watercourse was not exempt by reason of its connection with a lead mine,—*scil.*, because it was not a *necessary* incident to the getting of the lead.

SMELTING MILLS, ETC.

Smelting mills, iron-works, etc.,—assessment of.

Moreover, it required to be constantly borne in mind, that when once the ore had been washed and made merchantable, the operation of mining was complete; and the mineral was then ready for the process of manufacture; and the smelting mills, therefore, and the furnaces, machinery, buildings, and conveniences attached to them, were rateable, the rate being assessed, not indeed according to the profits of the mine or of the business (*f*), but according to the fair annual value of the property, as if it were to be let from year to year to indifferent persons for the purpose of carrying on the business. In other words, the property was, in such a case, assessed at such fair rent as the manufacturers would have paid if the property had not been in fact their own.

COLLIERY, ASSESSMENT OF, ITEMS IN.

Surface and underground works,—to be separately assessed;

The mode of valuing a colliery for the purposes of the poor rate may be as follows:—Value separately (1) the surface works and surface plant; and (2) the underground works and workings of the colliery. And Firstly, the surface works and plant are to be valued upon the principle that they are not directly productive of profit. Secondly, the net receipts in

(*d*) *Rex* v. *Bilston* (1826), 5 B. & C. 851.
(*e*) (1868), L. R. 3 Q. B. 478.
(*f*) *Rex* v. *Birmingham Gas Light Co.* (1836), 1 B. & C. 506; 2 D. & R. 735.

respect of the coal won and brought to bank are to be ascertained,—such net receipts being the gross receipts from (or gross produce of) the mines, less bad debts and less the expenses of cutting and bringing to bank. You are then to deduct from the net receipts, (1) a sum for the repair and renewal of the tenant's plant (*i.e.*, for depreciation of plant) (*g*) ; and (2) a sum for the risks and casualties of the mine, and for interest on the tenant's capital ; and (3) a sum for the tenant's skill and superintendence. There will then remain the "*gross annual value*" of the colliery ; and the "*net annual value*" (or rateable value) is, of course, the gross annual value after deducting therefrom the recognised statutory *deductions*, that is to say, the probable annual average cost of repairs, insurance, and other expenses necessary (*on the part of the landlord*) to maintain the colliery in a condition to command the hypothetical yearly rent ; and (where the colliery workings and works extend into different parishes) you will apportion the rateable value between the different parishes (*h*).

Separate assessments, items in the.

Working expenses,—items to be included in.

The expenses of cutting and bringing to bank (or the working expenses) will include all the working expenses both underground and above ground. And the underground working expenses will be for cutting headings, etc., air passages, etc. ; and for filling, hauling, etc. ; and the wages of firemen, engine men, etc. And the above-ground (or surface) expenses will be for winding, banking, etc. ; and for coals, etc., wood, etc. ; and the wages for labourers of all sorts employed at or about the pit, together with the salaries and office expenses of the lessee's agent or agents, and together also with the rates paid in respect of the surface (as enhanced in value by the pit).

IRONWORKS, ASSESSMENT OF.

Ironworks,—rateable value, ascertainment of.

And in order to arrive at the true rateable value of ironworks and the like, it will be necessary to find, first, the gross value of the works by the year to the hypothetical yearly tenant (excluding the letting value by the year of the tenant's chattels) (*i*); and then, secondly, the average annual cost to the landlord of the repairs, insurance, and renewals necessary to maintain the

(*g*) *Rex* v. *Tomlinson* (1829), 9 B. & C. 163 ; *R.* v. *Wells* (1867), L. R. 2 Q. B. 542.

(*h*) *Rex* v. *Foleshill* (1835), 2 A. & E. 593 ; *R.* v. *West Middlesex Water Works* (1859), El. & El. 542.

(*i*) *Rex* v. *Bilston* (1826), 5 B. & C. 851 ; *Rex* v. *Andover* (1777), Cowp. 550.

works in a condition to command a rent equal to such gross annual value; and that cost being deducted from the gross value, there will remain, of course, the net annual value or rateable value (*k*).

GASWORKS, ASSESSMENT OF, ANALOGY FROM.

Gasworks,—deductions to ascertain rateable value.

The principle or mode of rating above stated appears to be analogous to the mode sanctioned by the court for the rating of gas companies,—and which was to take the last account of the company in order to show the *gross receipts* and the expenditure —the difference forming the *net receipts* for the year; and then to deduct from the net receipts (1) a percentage (say twenty per cent.) for tenants' profits on the capital; (2) a sum for tenants' rates and taxes, and for the annual average cost of the repairs, renewal, and insurance of the buildings, stations, and plant; and (3) a sum for the renewal of the mains; and the sum which then remained was taken as that for which the works might reasonably be expected to let from year to year (*l*).

MAINTENANCE DEDUCTIONS.

Sewer rate,—when an item to deduct.

Where, under a local Act for the embanking and draining of a district consisting of several parishes, an annual sewers rate was imposed on the district, and the lands of the respondent were rated at a certain proportion, the rate being by the Act expressly made a landlord's tax, and the respondent's landlord having always paid the amount, and the whole rate being spent in each year in maintaining the drainage works, whereby the respondent's land was increased in value, it was held, that, in assessing the respondent to the poor rate, the drainage rate was a proper deduction to be allowed as an expense necessary to maintain the land in a state to command the rent (*m*).

COLLIERY IN ADJOINING PARISHES, VALUATION OF.

Colliery in different parishes, separate ascertainment of the

When coals are taken from under two or more parishes by the same pit or shaft, and by means of the same engines and machinery, and subject to the same general management, in

(*k*) Boyle on Rating, 2nd ed., p. 295.

(*l*) *R.* v. *The Sheffield United Gas Light Co.* (1863), 32 L. J. M. C. 169; and see *R.* v. *Lee Inhabitants* (1866), L. R. 1 Q. B. 241.

(*m*) *R.* v. *Gainsborough Union* (1871), L. R. 7 Q. B. 64.

values for the respective parishes.

such a case there is but one mine or colliery, and the following mode of valuation may be adopted, that is to say :—First ascertain, that is to say, estimate, for what amount the coal in each of the different parishes, which contain no shaft for raising it to the surface, would let for, with the use (thrown in) of the common machinery and the general mode of management as enjoyed at the time of the assessment ; then, secondly, make the like estimate with reference to the coal raised in the parish in which the pit or shaft is situate, and include (of course) in this second estimate the due proportion attributable to this particular coal of the improved annual value of the works and machinery used for the whole mine ; then thirdly, ascertain what would be a reasonable annual sum for a lessee of the coal in each of the other parishes to pay for the right to use in respect of his coal the common works and machinery and management ; and deduct the amount of this last-mentioned annual sum from the amount firstly above estimated ; and add the amount so deducted to the amount secondly above estimated ; and the respective amounts will be the respective assessments in the different parishes (*n*). And there can, in general, be little difficulty in ascertaining the parishes in which the mines are situate (*o*),—although there may be some difficulty occasionally, as where the question turns upon the true construction of some inclosure Act or the like (*o*).

COLLIERY, OR WORKS, NOT IN FULL USE.

Works in full use and not in full use,—distinguished.

Where the ironworks or other like works which are proposed to be rated are rated separately, and every part of the works is at the time in actual permanent use, the rate is upon the value of the whole ; but it has been said, that when the works are in excess of the actual requirements for the time being, the value for the purpose of the poor rate may fairly and justly be assessed at a less sum than it would be if the works were in use to the full extent of their capacity (*p*) ; and that if it should happen that portion of the works were not in use at all,—that severable (and for the time being superfluous) portion of the works, if assessable at all, would be assessable upon a different principle altogether (*q*).

(*n*) *Rex* v. *Foleshill* (1835), 2 A. & E. 593.
(*o*) *Rex* v. *Pitt* (1833), 5 B. & Ad. 565.
(*p*) *R.* v. *South Staffordshire Water Co.* (1886), 16 Q. B. D. 359.
(*q*) *Ibid.*

Mineral field, where part only gotten quarterly.

In *R.* v. *Whaddon Overseers* (*r*), B. appealed against a poor rate made quarterly, and showed that by an agreement between himself and A., who was the owner of certain land (containing coprolities) situate within the parish, A. had authorised B., to the exclusion of all other persons, to enter upon, hold, and use the said lands for the purpose of digging, raising, and carting away the coprolites therein, B. agreeing to pay A. 115*l.* per acre, and to dig only such fields as should be set out from time to time by A.'s agent, and to dig sufficient to realize and pay to A. 1,000*l.* a year at the least, payable quarterly, and also to restore the surface soil after the coprolites had been dug out; and it appeared that B. dug ten acres at the least every year, at an average of two and a half acres per quarter; and that he was in possession of ten acres during at least one whole year, only about one-fourth of these ten acres, however, being dug over and exhausted in each quarter, and one acre at least being always occupied by him for mills and tramways, so that three acres and a half was the greatest quantity ever in use by him in any one quarter-year for coprolite purposes, and six acres and a half were always during the same quarter-year lying unproductive, B.'s occupation perpetually shifting as fresh land was taken on at one end of his occupation and as old land was relinquished (as and when levelled) at the other end,—and under these circumstances, the court held that B. was properly rated in each quarterly rate in respect of ten acres at their enhanced or coprolite value.

SURFACE OCCUPIED WITH MINE.

Surface lands occupied with (non-rateable) mines,—rateability of; and mode of valuing.

In *Guest* v. *East Dean Overseers* (*s*), where the owner of certain iron mines rented two acres and a half of surface land, partly over and partly adjoining the mines, and occupied the mines and surface land together, having erected on the surface buildings, machinery, workshops, and tramways,—the court held, that he was rateable to the poor rate in respect of the surface land with the buildings, etc., thereon, although they were occupied in connection with a subject-matter which was not then rateable, viz., an iron mine, and although the surface land and buildings, etc., thereon would without the mines have been practically valueless; and it was there stated, that the way to ascertain the rateable value was to assume the mines and surface to be in different hands, and then to calculate what rent the

(*r*) (1875), L. R. 10 Q. B. 230. (*s*) (1874), L. R. 7 Q. B. 334.

occupier of the mines would have to pay for the surface land with the buildings, etc., thereon.

UNOPENED MINES.

Unopened mines,—are "*unoccupied*," and therefore are exempt.

A poor rate assessed in respect of an *unoccupied* tenement is simply a void rate (*t*),—*scil.*, because there is no beneficial occupation in such a case,—although, by special local Act, an unoccupied tenement may be rateable, at one half (say) of the usual rate; and it appears to follow, that a mine which is *unoccupied* would not be rateable, and it is difficult to see how an *unopened* mine could be deemed in the actual beneficial occupation of anyone within the meaning of *occupier* or *occupation* in the Poor Law Acts. The Irish Act (1 & 2 Vict. c. 56), s. 63, expresses only that "*opened mines*" shall be rateable to the poor rate—and only after they have been open seven years, the like provision being applicable to mines that are re-opened after a *bonâ fide* abandonment.

DROWNED-OUT AND EXHAUSTED MINES.

Drowned-out colliery,—exempt.

A drowned-out colliery or mine is not rateable while it continues in that condition—that is to say, a permanently drowned-out mine or colliery is not rateable—there being no beneficial occupation in such a case (*u*). Also, a coal mine (*x*) or other mine, or a brickfield (*y*), once it is exhausted, ceases to be rateable at all (that is to say, as a mine or brickfield) so soon as it is exhausted; *secus*, where the mine or brickfield is not exhausted, but is still being worked, although it has ceased to be workable at a commercial profit (*z*). But an exhausted brickfield may, of course, become rateable again, *e.g.*, when it becomes otherwise *occupied*.

Colliery no longer workable to a profit,—not exempt.

COAL MINES UNDER THE SEA.

Coal-mines under the sea,—being extra-parochial,

And regarding coal mines under the sea,—these mines, so far as they are Crown property, are exempt from the poor rate—at least while in the Crown's own beneficial occupation; and

(*t*) *Rex* v. *Aberystwith* (1808), 10 East, 354; *Hare* v. *Putney Churchwardens* (1881), 7 Q. B. D. 223; *Lambeth Churchwardens* v. *London County Council*, [1897] A. C. 625.

(*u*) *Tyne Coal Co.* v. *Wallsend* (1877), 46 L. J. M. C. 185.

(*x*) *Rex* v. *Bedworth* (1806), 8 East, 387; *Rex* v. *Rochester* (1810), 12 East, 358; *Rex* v. *Granville* (1829), 9 B. & C. 188.

(*y*) *R.* v. *Westbrook* (1847), 10 Q. B. 178.

(*z*) *Rex* v. *Parrott* (1794), 5 T. R. 593.

that would be so, whether the mines extended under the sea-shore only or extended beyond the sea-shore into and under the sea-bed (*a*). And the seashore being, in the general case, extra-parochial, and the sea-bed being in all cases extra-parochial (*b*), the mines under the sea would also be extra-parochial,—so that, apart from any statutory provisions to the contrary, all such mines (whether in the occupation of the Crown or its lessees, or in the occupation of some private owner or his lessees) would be exempt from the poor rate, that being a rate only in respect of lands *within the parish*. And the like exemption, and for the like reason (if for no other reason), would extend, of course, to the mines under the sea-shore (*scil.*, the fore-shore) adjoining and forming part of the county of Cornwall, which either as being parcel of any adjacent manor belong to the lord of that manor (whether he be the Duke of Cornwall or be anyone else) or which, by virtue of the 21 & 22 Vict. c. 109, s. 1, are vested in the Duke of Cornwall as parcel of the possessions of the Duchy (*c*). And although, by the 20 Vict. c. 19, extra-parochial places are for the most part made parishes of themselves and liable to be assessed to the poor rate—*scil.*, for the relief of the poor of their own parish—it does not appear how such a provision can be applicable to any of these last-mentioned mines, save possibly where the sea-shore (as an extra-parochial place) has been either incorporated with (*d*), or (by order of the Local Government Board) amalgamated with (*e*), the adjoining parish ; but there could, *semble*, be no such incorporation or amalgamation of the sea-bed properly so called (*f*). Possibly, however, when the mine commenced within the parish, and (as will usually be the case) extended seawards, its seaward extension (as well under the sea-shore as under the sea-bed) might be held to be within the parish for the purpose of the poor rate (*g*).

are, in general, exempt.

WAY-LEAVES, RATEABILITY OF.

Rents payable for rights of way are frequently called way-leave rents or way-leaves, and such rents are, of course, not rateable to the poor rate,—for they are incorporeal hereditaments

Way-leaves, —"*occupation*" in respect of.

(*a*) Hunt, on Bounds., by Brown, 4th ed., pp. 7, 12.

(*b*) *Ibid.* pp. 8—12, 16, 17 ; *R.* v. *Musson* (1858), 8 E. & B. 900 ; *Bridgewater Trustees* v. *Bootle-cum-Linacre* (1867), L. R. 2 Q. B. 4.

(*c*) *Penryn Corporation* v. *Holm* (1877), 2 Ex. D. 328.

(*d*) 31 & 32 Vict. c. 122, s. 27.

(*e*) 42 & 43 Vict. c. 54, s. 6.

(*f*) *Blackpool Pier Co.* v. *Fylde Union* (1877), 46 L. J. M. C. 100.

(*g*) *McCannon* v. *Sinclair* (1859), 2 El. & El. 53.

and incapable as such of *occupation*. But the word way-leave more properly denotes the right of way or of passage (above ground or under ground) over land other than the land demised; and the right may or may not include the site (or soil) of the land over which the way-leave extends; and in any case, the land or field through or over which the way-leave extends will acquire an enhanced value—that is to say, will be of a higher rateable value—than the land in its natural state would be; and the party to be rated in respect either of the way-leave or of the land with the way-leave running through it will be, of course, the party (whether lessor or lessee) who is in the beneficial (and exclusive) occupation of the land, whether site or field (*h*).

WAY-LEAVES, RATE, INCIDENCE OF.

Lessee of way-leave,—when "*occupier*," is rateable;

The general rule is, of course, well settled, that no one can be rated as the *occupier* of a right (*i*), and a mere way-leave is but a right (*k*); but this distinction is also well settled, viz., that where any actual interest in the land passes with the right, and such interest gives the right to the *exclusive* occupation,—which often happens in the case of a license to work mines,—the lessee will, in such a case, be rateable as an *occupier* (*l*). Thus, in *Rex* v. *Bell* (*m*), where the Dean and Chapter of Durham, after having granted certain surface leases, with a reservation to the lessors of the right of granting waggon-ways subject to paying damages for spoil of ground, demised the reserved rights to the defendants, who thereafter constructed roads in a manner most convenient to themselves, and for their own exclusive use, and also erected gates across the roads, which gates were kept locked, and only opened when the waggons were travelling,—Lord KENYON said:—The question was, whether the defendants were possessed of property rateable to the poor; and although it had been contended, that, because the dean and chapter could only grant a way-leave, therefore

(*h*) *R.* v. *Grand Junction Rail. Co.* (1844), 4 Q. B. 18; *R.* v. *Kentmere* (1851), 17 Q. B. 551; *R.* v. *Flëtton* (1861), 30 L. J. M. C. 89.

(*i*) *Rex* v. *Nicholson* (1810), 12 East, 330; *Williams* v. *Jones* (1810), 12 East, 346; *Rex* v. *Eyre* (1810), 12 East, 416; *Rex* v. *Bell* (1798), 3 M. & S. 221; *Rex* v. *Snowden* (1833), 4 B. & A. 713; *Rex* v. *The Mersey and Irwell Navigation Co.* (1829), 9 B. & C. 95; *Rex* v. *Thomas* (1829), 9 B. & C. 114; *Rex* v. *Undertakers of the Aire and Calder Navigation* (1861), 9 B. & C. 820; *Rex* v. *Chelmer and Blackwater Navigation* (1831), 2 B. & A. 14, 18.

(*k*) *Rex* v. *Jolliffe* (1823), 2 T. R. 90.

(*l*) *Rex* v. *Bell* (1798), 7 T. R. 598.

(*m*) (1798), 7 T. R. 598; *Rex* v. *The Mayor of London* (1790), 4 T. R. 21.

nothing more than a mere right of way-leave passed to the defendants, that did not at all follow; and they were not to inquire too nicely into the titles of occupiers,—for if a disseisor obtained possession of land, he was rateable as the occupier of it; and the defendants in the present case clearly appeared to be the occupiers (*n*).

And the same principle has been uniformly applied, whenever there has been an actual and *exclusive* occupation of land in connection with an incorporeal right (*o*).

and otherwise, the lessor is rateable.

Also, as regards all those cases in which a mere right of way is granted, and no exclusive interest in the land at the same time passes by the grant, although the owner or lessee of the right is not rateable, the lessor or owner of the land over which the right of way is exercised will undoubtedly be rateable,—and as occupier,—for and in respect of the improved value accruing to the land from the grant of such right of way (*p*).

However, in Ireland, way-leaves (although mere rights or easements) are expressly declared rateable, by the Irish Act (1 & 2 Vict. c. 56), s. 63.

WAY-LEAVES IN ADJOINING PARISHES, VALUATION OF.

Way-leaves over different parishes,—separate ascertainment of the values for the respective parishes.

Where the way-leave right is of a kind to be rateable, and it extends or runs over different parishes, the principle of rating it is analogous to that of rating a line of railway in different parishes. And it is now established, that the proper mode, in such cases, is to ascertain the actual rateable value of the land occupied by the railway in each parish by the ordinary rules of assessment; and such rateable value in each parish must be taken from the net earnings in that parish, that is to say, the gross yearly earnings, less all expenses and deductions which are fairly applicable to the part of the railway within the parish, and without any regard being paid to the general profits of the line (*q*). And the rating authority will estimate, as practical

(*n*) (1798), 7 T. R. 598; *Rex* v. *The Mayor of London* (1790), 4 T. R. 21.

(*o*) *Rex* v. *Milton* (1819), 3 B. & A. 112; *Rex* v. *Macdonald* (1810), 12 East, 324; *Rex* v. *Brighton Gas Co.* (1826), 5 B. & C. 466; *Rex* v. *Rochdale Waterworks Co.* (1813), 1 M. & S. 634; *Rex* v. *Chelsea Waterworks Co.* (1833), 3 B. & A. 156.

(*p*) (1829), 9 B. & C. 112, *per* PARKE, J.

(*q*) *Great Eastern Rail. Co.* v. *Haughley Overseers* (1866), L. R. 1 Q. B. 666; 35 L. J. (N.S.) M. C. 229; see also *R.* v. *The London, Brighton, and South Coast Rail. Co. etc.* (1851), 15 Q. B. 314; 20 L. J. (N.S.) M. C. 124; *R.* v. *The Great Western Rail. Co.* (1858), 15 Q. B. 380; 21 L. J. (N.S.) M. C. 84; *Rex* v. *Kingswinford* (1827), 7 B. & C. 236; *Rex* v. *Milton* (1819), 4 B. & A. 112; *Rex* v. *Barnes* (1830), 1 *ibid.* 113; *Rex* v. *Trent and Mersey Navigation Co.* (1834), 1 B. & C. 545.

men of business, what annual rent a hypothetical tenant would give for the particular portion of the line, having regard to all the relevant circumstances.

ROYALTIES, RATEABILITY OF, AND INCIDENCE OF RATE.

Uncertain rents, or royalties,—not being "*occupyable*," were, in general, exempt.

A colliery is sometimes called a royalty—*scil.*, in popular language; and in that sense a royalty is, of course, rateable to the poor rate. But a royalty in its most ordinary legal sense denotes merely an uncertain money payment, reserved by way of rent; and it is therefore a purely incorporeal hereditament, and as such, it is incapable of occupation, and so is not rateable to the poor rate. Thus, in *Rex* v. *Tremayne* (*r*), where the royalty reserved was a sum of 1*l.* 15*s.* for every ton of manganese raised by the adventurers (licensees of the landowner), the licensor was held not to be rateable in respect of such royalty, although it looked like an ordinary profit from the land of which he remained in the occupation; and where the royalty consisted of a render of portion of the mineral, not in its natural, but in its manufactured state—*e.g.*, where (as in *Rex* v. *Pomfret* (*Earl*)) (*s*), the royalty was a proportion of the *lead that should be smelted from the ore* raised from the demised mine—the lessor was held not rateable in respect of it,—*scil.*, because such a reservation was in the nature of an uncertain money payment.

Secus, where they were portion of the very ore itself,—

Where, however, the royalty was not of an uncertain money payment, nor yet of a proportion of the smelted mineral, but was a reservation of portion of the ore or mineral itself, it was rateable to the poor rate,—that is to say, the lessor who received it was liable to be rated in respect of it, and that even when the mineral was raised out of mines which were not themselves rateable under the 43 Eliz. c. 2. Thus, in a case of *Rowls* v. *Gell* (*t*), where the plaintiff was lessee under the crown of all lead mines within Wirksworth, in the county of Derby, *with lot and cope*—lot being a duty of every thirteenth dish or measure of lead-ore dressed and made merchantable, and cope being a duty of nine dishes of lead-ore for every load—and these duties were payable to the crown

(*r*) (1832), 4 Brad. 162; and see *Rex* v. *Rochester* (*Bishop*) (1810), 12 East, 353; *Rex* v. *Welbank* (1815), 4 M. & S. 222; *R.* v. *Westbrook* (1847), 10 Q. B. 178.

(*s*) (1816), 5 M. & S. 139.

(*t*) *Rex* v. *Rochester* (*Bishop*) (1810), 12 East, 353; *Rex* v. *Welbank* (1815), 4 M. & S. 222; *R.* v. *Westbrook* (1847), 10 Q. B. 178.

lessee by the persons actually working the mines under the local customs, and he (the crown lessee) was rated for their amount, which, though usually variable) realised in the particular rating year the sum of 500*l.*—the court held, that the crown lessee (as landlord) was properly rated ; and Lord MANSFIELD, while fully admitting that lead mines were not within the statute of Elizabeth, observed, that the benefit from lot and cope was not a mere casual profit, but was an annual revenue—*scil.*, because if the mine produced profit to the miner, the landlord's share of that profit was certain, the miner being obliged to pay such certain share of profit to the crown lessee as owner of the land ; and that obligatory payment being in respect of the land, and a profit out of it, the landlord ought not to receive that profit clearer of the poor rate than any other profits of his estate, merely because he was at no trouble, expense, or risk in earning it.

Receiving the very ore itself being an "*occupation*" of the ore.

Also, in *Rex* v. *St. Agnes* (*u*), a case in Cornwall, where the owners were rated for the fifteenth part (called the toll-tin) of all the tin arising out of certain lands, and for the twelfth part (called the farm-tin, or farm-due) of the remainder of the lands, the court held the owners to be properly rated. And in *Rex* v. *Baptist Mill Co.* (*x*), where the defendants were the lord's lessees of certain mines, and as such were entitled to (and they were rated in respect of) the lot, toll, and free shares of calamine (or *lapis calaminaris*), payable to them in kind by the adventurers who actually worked the mineral, the court held that the lord's lessees were properly rateable,—that is to say, were rateable as *occupiers* of portion of the produce of the land, or, in other words, of the land itself,—LE BLANC, J., observing :—That whenever a person receives a proportion of the produce extracted from the bowels of the earth, he is an occupier of land, and not the less so, because he receives his proportion without risk; and BAYLEY, J., observing :—That the soil belonged to the lord (or to the lord's lessees), and the lord (or his lessees) had the actual occupation and possession of the land ; and the share of the produce or profits which came to the owner of the soil was his share in the pernancy of the profits of the land, such owner having a qualified occupation and perhaps a more complete occupation than the adventurers themselves, who might be considered as servants to him ; and it was not doing any

(*u*) (1789), 3 T. R. 480 ; and distinguish *R.* v. *Crease* (1840), 11 A. & E. 677 ; 9 L. J. (N.S.) M. C. 38.

(*x*) (1813), 1 M. & S. 612.

violence to the word *occupier* to consider the lord's lessees as occupiers of the land.

And the lessor accordingly was rateable,—even where he might (at his option) accept the value in money.

Also, where the reservation was of the tin or other ore to be raised within the limits prescribed by the sett (or lease), and the adventurers were required, *at the option of the lessor*, to pay the share in money at the market price, still the lessor was held to be properly rateable in respect of his share of the ore, although he had elected to receive his share in money (*y*). And where the render was of lead or other ore *cleansed*, *dressed*, *washed*, *and made merchantable*, *and fit for the smelting mill*, the court held that the lessor was liable to be rated as an occupier in respect of that render, *lead fit for the smelting mill* not being the same thing as *lead smelted* ; and in such a case, it made no difference whether the tender was under a lease (or sett), or was merely by virtue of the local mining customs (*z*). Also, it made no differenee as regards the lessor's liability, if the mine was worked under a license—*scil.*, because if he was liable in respect of his proportion when he was only considered to be in possession of that proportion of the mine, *à fortiori* he was liable when he was in possession of the whole mine (*a*).

TITHEABLE MINES, RATING OF.

Tithe, and commuted tithe.

Where the mines were subject to tithes, whether due by local Act of Parliament or by custom, the tithe-owner was liable, in respect of the tithe, to be rateable to the poor rate,—and that whether the tithe remained payable in kind or had been commuted (*b*), and although the mines themselves were not rateable within the 43 Eliz. c. 2.

RATING ACT, 1874, PROVISIONS OF.

Rating Act, 1874,—

By the Rating Act, 1874 (*c*), which followed upon the decision of the House of Lords in *Morgan* v. *Crawshay* (*d*), the exemption which mines other than coal mines had theretofore enjoyed from liability to the poor rate was (as has been already mentioned) abolished ; and by that Act, which came into operation (s. 11) on April 6th, 1875, and which (like the old

(*y*) *Rex* v. *St. Austell* (1822), 5 B. & Ald. 693 ; *Van Mining Co.* v. *Llanidloes* (*Overseers*) (1876), 1 Ex. D. 310.

(*z*) *R.* v. *Todd* (1840), 12 A. & El. 816 ; 10 L. J. (N.S.) M. C. 14 ; *Crease* v. *Sawle* (1842), 2 Q. B. 862.

(*a*) *Rex* v. *St. Austell* (1822), 5 & Ald. 700 ; *Lord Bute* v. *Grindall* (1793), 2 H. Bl. 265 ; *Eccleshall* v. *Briggs* (1790), 4 T. R. 6 ; *Atkins* v. *Davis* (1783), Cald. 315 ; *Holford* v. *Copeland* (1801), 3 B. & P. 129.

(*b*) 6 & 7 Will. 4, c. 71, s. 69.

(*c*) 37 & 38 Vict. c. 54.

(*d*) (1871), L. R. 5 H. L. 304.

statute of Elizabeth) applies to England and Wales only (s. 2), it has been enacted (s. 3), that the poor rate Acts shall extend to (among other hereditaments) mines of every kind not specified in the Act of Elizabeth.

(1) Mines of *clay*, etc.,—valuation of;

And it appears (by inference from s. 15 of the Rating Act, 1874), that as regards *mines* of clay, limestone, freestone, or other stone,—and in fact as regards all other *mines* which are for the first time made liable to the poor rate by the Act (other than the tin, lead, and copper mines to be presently mentioned),—the "*gross value*" is to be the "*gross estimated rental*" of the Union Assessment Act, 1862 (*e*). But as regards tin, lead, and copper mines, the following specific provisions are contained in the Act (s. 7), that is to say :—

(2) Mines of *tin*, *lead*, and *copper*,—valuation of : (*a*) Where no fine;

Firstly, that where a tin, lead, or copper mine is occupied under a lease or leases granted (*without fine*) on a reservation wholly or partly of dues or rent, the "*gross value*" of the mine shall be taken to be the annual amount of the whole of the dues payable in respect thereof during the year ending on December 31st preceding the date at which the valuation list is made, in addition to the annual amount of any fixed rent reserved for the same which may not be paid or satisfied by such dues ; and that the "*rateable annual value*" of such mine (occupied under such lease or leases as aforesaid) shall be the same as the gross value thereof,—except that, where the person receiving the dues or rent is liable for repairs, insurance, or other expenses necessary to maintain the mine in a state to command the annual amount of dues or rent, the average annual cost of the repairs, insurance, and other expenses for which he is so liable shall be deducted from the gross value for the purpose of calculating the rateable value.

(*b*) Where fine;

And Secondly (s. 7), that where a tin, lead, or copper mine is occupied under a lease granted wholly or partly *on a fine*, or where any such mine is occupied and worked by the owner himself, the gross and rateable annual value of the mine shall be taken to be the annual amount of the dues (or dues and rent) at which the mine might be reasonably expected to let, *without fine*, on a lease of the ordinary duration according to the usage of the country, if the tenant undertook to pay all tenant's rates and taxes and tithe rent-charge, and also the repairs, insurance, and other expenses necessary to maintain the mine in a state to command such annual amount of dues (or

(*e*) 25 & 26 Vict. c. 103.

(c) Other cases.

dues and rent). And these latter provisions, as to gross and rateable annual value, apply also (s. 7) to all other mines of tin, lead, or copper not falling within any of the above-stated specific provisions,—save only in the case of the dues (or royalty) being wholly reserved in kind, the Act not applying at all (s. 13) in such latter case (*f*).

Local rates, generally,—provisions regarding.

The Rating Act, 1874, also provides (s. 10) that the mines which (with other hereditaments) are for the first time made rateable by the Act to the poor rate shall be rateable also to all local rates in like manner as if the poor rate Acts had always extended to such mines (and other hereditaments),—the term "local rate" meaning (s. 15) any county rate, borough rate, highway rate, and other local rate leviable on property rateable to the relief of the poor; but the Act provides (s. 8), that when any poor or other local rate, which at the commencement of the Act any lessee, licensee, or grantee of a mine was exempt from being rated to in respect of such mine, becomes payable by him in respect of *such* mine during the continuance of his lease, grant, or license—or before the arrival of the period at which the amount of the rent, royalty, or dues is liable to revision or re-adjustment—he may (unless he has *specifically* contracted to pay such rate in the event of the abolition of the said exemption) deduct from any rent, royalty, or dues payable by him *one-half* of any such rate paid by him, it being understood that he shall not deduct any sum exceeding what one-half of the rate in the pound of such poor or other local rate would amount to if calculated on the rent, royalty, or dues so payable by him.

Mine, dues, etc.,—definitions of.

And it is provided (s. 7), that in the construction of all these provisions the term "*mine*," when a mine is occupied under a lease, shall include the underground workings and the engines, machinery, workshops, tramways, and other plant, and buildings (not being dwelling-houses), and works, and surface of land occupied in connection with and for the purposes of the mine and situate within the boundaries of the land comprised in the lease or leases under which the dues (or dues and rent) are payable or reserved; and the term "dues" is to mean dues, royalty, or toll, either in money, or partly in money and partly in kind, the amount of dues which are reserved in kind meaning

(*f*) *Rex* v. *St. Austell* (1822), 5 B. & Ald. 693; *Van Mining Co.* v. *Llanidloes (Overseers)* (1876), 1 Ex. D. 310.

the value of such dues; and the term "lease" is to mean lease or sett or license to work, or agreement for a lease or sett or license to work; and the term "fine" is to mean fine, premium, or foregift, or other payment or consideration in the nature thereof.

RATING ACT, 1874, DECISIONS UPON.

Dues, "wholly reserved in kind,"—what are.

In *The Van Mining Co.* v. *Llanidloes (Overseers)* (*g*), where a mining company, at the commencement of the Rating Act, 1874, occupied, under a lease from L., a lead mine with engines, machinery, and plant—L. receiving as royalty a share of the minerals obtained, which royalty he might, at his option, receive in money—the court held that L. was properly rated in respect of the royalty payable to him, although he had elected always to receive it in money, the case falling exactly within s. 13 of the Act.

"Specific contract" as regards local rates,—what is.

In *Devonshire (Duke)* v. *Barrow Hæmatite Steel Co.* (*h*), where the question arose as to what was a "*specific* contract" within the meaning of s. 8 of the Act—the lessee having covenanted during all the term to pay the rent and royalties reserved by the lease "free and clear of and from all rates, taxes, tithe rent-charges, expenses and deductions whatsoever, parliamentary, parochial, or of any other nature"—the court held, that there was not in these words any such specific contract as was intended by the Act, COCKBURN, L.C.J., saying:—That where the contract existing at the time of the passing of the Act was (as to rates and taxes) general only, there the tenant was to be at liberty to deduct the one-half under s. 8; and that it was only where the contract had in express terms provided for the contingency of the legislature taking away the exemption, and the lessee had covenanted to pay the rate or rates if the contingency happened, the lessee was to be liable to pay the whole of the rent or royalty without any deduction of the one-half: In other words, in order to protect the lessor against any deduction of the one-half, the contract must specifically refer to the possible abolition of the exemption by parliament, and in the absence of any such reference, and the language being general, no specific contract within the meaning of s. 8 could be established.

(*g*) (1876), 1 Ex. D. 310.

(*h*) (1877), 2 Q. B. D. 286.

MINES AND QUARRIES, DISTINCTIONS BETWEEN, FOR RATING PURPOSES.

Quarries,—not exempt as mines.

The construction of the statute of Elizabeth did not exempt *minerals*, but only *mines* (other than coal mines), from liability to the poor rate; so that, if minerals of whatever sort were obtained by quarrying or in any other manner than by mining, the lessee or owner was liable to be rated as an occupier of land; for example, for limestone (*i*), slate (*k*), clay (*l*), or other mineral obtained by quarrying.

Mine or quarry,—necessity for distinguishing between.

It became necessary, therefore, for the rating authority to determine in each particular case, whether the mineral workings were a mine or were a quarry; and the court of Queen's Bench would always return a case to the quarter sessions, if it were not sufficiently expressed in the appeal case whether the place in question was a mine or a quarry,—it not being sufficient to merely describe the works, and to leave the conclusion to the court; or, in other words, the sessions were to find the fact,—not to furnish the evidence (*m*).

A limestone quarry,—when a mine.

In one case, a rate was assessed upon the Earl of Dudley, as the owner and occupier of limestone works. The strata were stated to crop out or terminate frequently at the surface, and to deepen in the opposite direction. Several workings had been effected by daylight or open work; and afterwards the continuing strata were worked at from forty to fifty yards below the surface, by pit shafts, steam engines, and other apparatus suitable for working coal, ironstone, and other minerals. The produce was wholly drawn up the pit shafts, or sent off by an underground level. The working required experience, and was carried on by persons brought up to the occupation, called limestone miners. It was held by the court of King's Bench, that the property was not rateable, Lord TENTERDEN remarking:—That the description of the manner in which the stone was obtained corresponded with the usual mode of mining; the existence of metal was not necessary to constitute a mine; and to deny the character of a mine to the works in question, would be to depart from the ordinary and proper meaning of that word in the English language (*n*).

(*i*) *Rex* v. *Alberbury* (1801), 1 East, 534.
(*k*) *Rex* v. *Woodland* (1802), 2 East, 16.
(*l*) *Rex* v. *Brown* (1807), 8 East, 528.
(*m*) *Rex* v. *Dunsford* (1835), 1 A. & E. 568; 4 N. & M. 349.
(*n*) *Rex* v. *Sedgeley* (1831), 2 B. & Ad. 65.

In another case, where a perpendicular shaft had been sunk from the surface for the purpose of raising clay out of the strata, and this was effected by a steam-engine and other mining apparatus—the excavations being like those made for working coal, and the mode of raising the clay being the same as that used in a coal mine—the property was held not rateable (*o*).

A clay quarry,—when a mine.

And the like decision was given in *Rex* v. *Dunsford* (*p*), where the works from which the mineral (freestone) was raised were found to be a mine and not a quarry, being approached by a waggon-way, three hundred yards in length, and communicating with an inclined plane at the mouth of the quarry, which was entered by a level,—one excavation being ninety-seven yards under the ground, and the works being carried on by candle-light only, and skill and judgment being required for the excavation, and for properly supporting the roof exactly as in a mine.

A freestone quarry,—when a mine.

And, generally, it may be said, that the fact of the existence of a mine must depend upon the nature of the place where the mineral is severed from the land. If the place of operation be fully, or even partially, exposed to the light of day, it must be considered a quarry. If, on the other hand, it is only approachable by means of a perpendicular pit or a horizontal level, or any excavation of a similar character, and the works are necessarily carried on by subterraneous workings, for which the light of day is insufficient, the place must be considered, to all intents and purposes, a mine,—save, as will presently be mentioned, for the purposes of the income or property tax.

QUARRIES, BRICKFIELDS, AND CHALK-PITS,—RATING OF, GENERALLY.

Open works,—rating of: (1) Quarries.

The observations already made with respect to the mode of rating coal mines, and property held with them, will in general apply equally to quarries; also, the person liable to be rated is he who is in the beneficial and exclusive occupation; therefore, the grantee of a license to work quarries, where the license does not operate to confer an exclusive interest, is not liable to be rated (*q*).

(2) Brickfields.

The occupier of a brickfield is rateable; and in the case of a brickfield, the rateable value (or hypothetical rent by the year)

(*o*) *Rex* v. *Brettell* (1832), 3 B. & Ad. 424.
(*p*) (1835), 1 A. & E. 574.
(*q*) *Rex* v. *Trent and Mersey Navigation Co.* (1834), 4 B. & C. 57.

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RATING OF MINES AND QUARRIES.

is, in general, the aggregate amount of the fixed rent payable for the land and of the uncertain (or royalty) rent payable in respect of the brick-earth worked and gotten (*r*),—such royalty not being any the less a rent, because it is payable in respect of the brick-earth (portion of the soil) that is consumed in the use (*s*); and the rating authority may specifically find the rateable value at such aggregate, and should, in general, do so (*t*).

(3) Chalk-pits.

The rateable value of a chalk-pit is the rent which it might reasonably be expected to let at, from year to year, free of the expenses necessary to maintain it in a condition to command such rent (*u*); and the rent might possibly be—but would not necessarily be—augmented by reason of the proximity of the cement works at which the chalk gotten from the pit was used, although the profits from the cement works could not be specifically considered in arriving at the rateable value of the chalk-pit (*x*).

(ii.) Taxes: and local rates generally.

Proceeding nextly to the consideration of rates other than the poor rate, and to the consideration of taxes,—on and in respect of mines,—we have to consider,

(*a.*) The land tax;
(*b.*) The income or property tax;
(*c.*) The tithe, and tithe rent-charge;
(*d.*) Church rates; and
(*e.*) Local rates generally,—whether being county rates, borough rates, highway rates, general district rates, or lighting and watching rates.

(*a.*) LAND TAX.

Land tax,—incidence of.

The land tax is a tax, and not a rate (*y*); and although it usually falls upon the tenant (under the express provisions of his tenancy agreement) (*z*), it is properly a landlord's tax (*a*). If the tax has been redeemed, it is in general merged

(*r*) *R.* v. *Westbrook* (1847), 10 Q. B. 178.
(*s*) *R.* v. *Everist* (1847), 10 Q. B. 178.
(*t*) *Edmonds* v. *Eastwood* (1858), 2 H. & N. 811.
(*u*) *R.* v. *North Aylesford* (1872), 37 J. P. 148.
(*x*) *Ibid.*
(*y*) *Waterloo Bridge Co.* v. *Cull* (1858), 28 L. J. Q. B. 70; 29 L. J. Q. B. 10.
(*z*) *Bennett* v. *Womack* (1828), 7 B. & C. 627; 3 C. & P. 96.
(*a*) *Ward* v. *Const* (1830), 10 B. & C. 635, at p. 654.

in the land (*b*),—and when it is not so merged, it subsists no longer as a tax, but as a fee-farm rent (*c*). The tax was originally imposed by the 38 Geo. 3, c. 5 (made perpetual by the 38 Geo. 3, c. 60),—and was originally at the rate of 4*s.* in the pound (*d*), but is now at a rate not exceeding 1*s.* in the pound (*e*). And in the 38 Geo. 3, c. 5, s. 4, the tax is expressed to be a tax upon all and every manors, messuages, lands, and tenements; and also upon all *quarries*,—*mines* of *coal*, *tin*, *lead*, *etc.*, and *other mines*; *and iron-mills*, *furnaces*, *and other ironworks*; salt springs and *salt works*; all alum mines and works; and all hereditaments of whatever nature or quality,—situate, lying, and being—or happening or arising—within, etc. But seeing that (in the case of surface lands) the tax is only on the "profits,"—*i.e.*, on the fruits of the *occupation* of the premises, as distinguished from the profits arising or accruing from any trade carried on thereon,—being payable by the landlord to the extent that he receives such "profits," and being otherwise payable by the tenant (in respect of the residue of such "profits") (*f*),—it seems to follow, that unopened *mines* would not be mines within the Act or subject to land tax (*g*),—*scil.*, because they yield in fact no "*profit*" while and so long as they remain unopened; and the tax would therefore only become incident to the mines, when by being opened they began to yield a profit; and as regards *quarries*, a disused or abandoned quarry would not be liable to the tax,—because it yielded no "*profit*"; and for the same reason an unopened quarry, if such a phrase is allowable, would not be liable,—it being the amount of the "profit" that is assessed, equally in the case of taxes as of rates (*h*). And it has, therefore, been suggested, that in the case of all land (subject to the land tax) which contains minerals, the land tax should be redeemed before any "profits" are made to arise from the occupation and working of the minerals,—seeing that the price payable for the redemption will be much more considerable after the minerals yield a profit, than it would be before the minerals are won (*i*).

Mines, etc., taxable;

scil.,—if open, and producing profit; and otherwise not.

(*b*) 42 Geo. 3, c. 116, ss. 43, 126; *Faulkner* v. *Llewellin* (1847), 9 L. T. 251.

(*c*) 42 Geo. 3, c. 116, s. 123; 59 & 60 Vict. c. 28, s. 33.

(*d*) 42 Geo. 3, c. 116, ss. 180, 181.

(*e*) 59 & 60 Vict. c. 28, s. 31 (2).

(*f*) *Ward* v. *Const*, *supra*.

(*g*) *R.* v. *Fayle* (1856), 27 L. T. (o.s.) 64; 20 J. P. 263.

(*h*) See Boyle on Rating, 2nd ed., pp. 153, 206.

(*i*) *Lord Colchester* v. *Kewney* (1867), L. R. 1 Exch. 368; L. R. 2 Exch. 253.

(*b.*) INCOME OR PROPERTY TAX.

Income or property tax.

Either (*a*) as lands;

or (*b*) as a trading concern.

The income and property tax is, by the 5 & 6 Vict. c. 35, s. 1, imposed upon or leviable in respect of (among other things), Firstly, lands, tenements, and hereditaments in Great Britain, and in respect as well of the annual value thereof to the *owner* (Schedule A.) as also in respect of the annual value thereof to the *occupier* (Schedule B.); and, Secondly, the annual profits or gains (Schedule D.) arising or accruing to any person (*residing in Great Britain*),—(1) from any kind of property whatever (whether situate in Great Britain or elsewhere); or (2) from (among other things) any trade (whether the trade is carried on in Great Britain or elsewhere); or arising or accruing to any person (*not resident in Great Britain*),—(1) from any kind of property whatever situate in Great Britain, or (2) from (among other things) any trade carried on in Great Britain.

Mines and quarries,—"*annual value*" of, ascertainment of,—(*a*) when regarded as lands;—

And, Firstly, as regards mines and quarries (being portion of the "lands, tenements, and hereditaments" comprised in Schedule A.), it is provided, by s. 60 of the Act, that the annual value shall be the full amount for one year (or the average amount for one year) of the profits received therefrom, that is to say,—(1) In the case of quarries of stone, slate, limestone, or chalk, on the amount of the profits in the preceding year (No. III. Schedule A.); (2) In the case of mines of coal, tin, lead, copper, mundic, iron, and other like mines, on an average of the profits for the five preceding years (No. III. Schedule A.); and (3) In the case of (among other things) iron works, salt springs or works, alum mines or works, railways and other ways, and other concerns of the like nature, on the amount of the profits in the preceding year (No. III. Schedule A.),—the tax being, in each of these three cases, a charge on the person or persons or corporation working the quarry or the mine or carrying on the works. But it is provided,—(1) That if any mine of coal, tin, lead, copper, mundic, iron, or other like mine has *from some unavoidable cause* been decreased and is decreasing in the annual value thereof, so that the average of five years would not be the fair annual value thereof, the annual value of the profits in the preceding year may be allowed to be substituted; and (2) That if any such mine shall *from some unavoidable cause* have wholly failed, the assessment shall be wholly discharged (No. IV. Schedule A.).

Also, in all cases, the unredeemed land tax (if any) is to be deducted ; and also (among other things) the sewer rate (if any) for drainage, embankment, or the like (No. V. Schedule A.). And in all cases, the profits of any lands used or occupied in or about the concern are to be excluded from the profits above designated (No. III. Schedule A.) ; and such excluded profits are charged, under s. 63 of the Act, upon the annual value thereof to the *occupier* (Schedule B.), and are substantively so charged.

Deductions, specific,—for land tax, etc.;

And, Secondly, as regards the profits or gains falling within Schedule D. of the Act,—whether arising or accruing from the property in such schedule referred to (and which, of course, excludes all property already taxed under Schedules A. and B. or either of such schedules), or arising or accruing from the trade therein referred to,—it is provided, by s. 100 of the Act, (1) That the annual profits to be charged as profits arising or accruing from the property therein referred to, shall be the full amount of the profits or gains arising therefrom in the preceding year ; and (2) That the annual profits to be charged as profits arising or accruing from trade, shall be the full amount (upon a fair and just average for the preceding three years) of the profits or gains arising therefrom. And, under the 29 Vict. c. 36, s. 8, the profits arising or accruing from the quarries above referred to, and from the mines above referred to, and from the ironworks and other works above referred to, are now (as business "concerns") made chargeable by reference to the rules applicable to the profits and gains arising or accruing from a *trade* and so falling within Schedule D.

(*b*) when regarded as a trading concern ;—

And by the 41 Vict. c. 15, s. 12, it is provided, that,— as regards the profits of any trade under Schedule D., and also as regards the profits of any "concern" chargeable by reference to the rules of that schedule,—a deduction shall be allowed in respect of the depreciation during the year of the machinery and plant of the mine by reason of wear and tear,—*scil.*, when such machinery and plant belongs to the mining lessee ; and the lessor, when it belongs to him is (substantially) entitled to the like allowance. But (subject only to that express allowance) no deduction or allowance is (under Schedule D.) permitted,—on account of or for any disbursements or expenses whatever, "*not being money wholly and exclusively laid out or expended for the purposes of the trade or concern*"; nor (among other things) for the rent or value of any dwelling-house or

Deductions, specific,—for depreciation, and for expenses.

domestic offices, or any part of such dwelling-house or domestic offices, *except such part thereof as is used for the purposes of the trade or concern* ; nor, generally, for any sum expended for any purpose distinct from the purposes of the trade or concern. And, apparently, prior to the 41 Vict. c. 15, s. 12,—and according to the decision in *Forder* v. *Handyside* (*k*), where certain ironmongers had claimed to deduct from their chargeable annual profits a large sum in respect of such depreciation,—any such deduction was expressly prohibited by the 5 & 6 Vict. c. 35 ; and the decision in *Forder* v. *Handyside* merely followed, in this particular, a prior Scotch decision as to certain ironmasters who had claimed to make the like deduction (*l*).

SLATE MINE, TAXABLE AS A QUARRY.

When a mine is a quarry.

In *Jones* v. *Cwmorthen Slate Co.* (*m*), where the company was taxed to the property tax in respect of their slate *mine* as a slate *quarry*, the court held, that they were properly so rated ; and that this followed as a consequence of the peculiar provisions (as to mines and quarries) contained in Schedule A. (No. III.) of the 5 & 6 Vict. c. 35 ; for (under these provisions) it was the material gotten, and not the mode of getting it (whether by mining or by quarrying), that was to be regarded,—the tax being on the profits, and the popular sense of the word quarry being the sense intended by the Act.

PROFITS EARNED ABROAD, WHEN TAXABLE.

When earnings abroad are earnings at home.

In *The Cesena Sulphur Co.* v. *Nicholson* (*n*), the company was incorporated under the Companies Acts, 1862 and 1867, and was founded for the purpose of carrying on the business of sulphur miners, manufacturers, and merchants in Italy, and of purchasing certain sulphur mines and plant there,—all the operations connected with the manufacture and sale of the sulphur being exclusively carried on in Italy, where the company's profits were earned, and only the dividends required for the English shareholders being sent to the United Kingdom,—but the court held, that the company was "residing in the United Kingdom" within the 16 & 17 Vict. c. 34, s. 2, and was

(*k*) (1876), 1 Ex. D. 233.
(*l*) *Addie* v. *Solicitor of Inland Revenue* (1875), 12 L. R. Sc. 274; 1 Exch. p. 235 n.
(*m*) (1879), 4 Ex. D. 97 ; 5 Ex. D. 93.
(*n*) (1876), 1 Ex. D. 428.

therefore liable to pay income tax upon the whole of the profits wherever earned.

WHAT DEDUCTIONS ARE NOT AUTHORISED.

In *Knowles* v. *McAdam* (*o*), where certain persons carrying on the trade of a colliery were assessed under Schedule D. of the 5 & 6 Vict. c. 35,—that is to say, in respect of their trading "*concern*"; and they claimed that in estimating the balance of the profits or gains, a sum equal to the value of the coal gotten during the year should be deducted, upon the ground that the value of the capital assets of the business had to that extent been diminished by the exhaustion (so far) of the coal,—the Court (KELLY, C.B., CLEASBY and POLLOCK, BB.) considered the claim good, and that it was (in fact) a necessary consequence of the 29 Vict. c. 36, s. 8, whereby the concern was made chargeable by reference to Schedule D., and was (in effect) taken out of Schedule A.; and the deduction claimed was also (the court observed) wholly distinct in character from the claim for depreciation which, prior to 41 Vict. c. 15, s. 12, was disallowed in *Forder* v. *Handyside*, *supra*. However, in the later case of *Ryhope Coal Co.* v. *Foyer* (*p*), the true effect of the 29 Vict. c. 36, s. 8, was stated to be merely this, namely:—That the 5 & 6 Vict. c. 35 had treated mines as land within Schedule A., and not as a trade within Schedule D.; but the 29 Vict. c. 36 had directed mines to be treated as a trade within Schedule D.,—that is to say, had made mines chargeable by reference to Schedule D., so far as the rules contained in Schedule D. were "*consistent with No. III. of Schedule A.*,"—the effect of this being not to introduce, *e.g.*, the *three* years' average appointed by Schedule D., but to leave the *five* years' average or (as the case might be) the one year's value unaffected. And, in *Coltness Iron Co.* v. *Black* (*q*), it was considered, that *Knowles* v. *McAdam*, *supra*, was wrongly decided,—that is to say, that notwithstanding the colliery was to be assessed as a trade or "concern," no deduction should be allowed for the partial exhaustion of the coal seam; and it was there also held, that the colliery lessee was not entitled, in computing profits for assessment to the income or property tax, to deduct from such profits the cost of sinking a pit,—or rather a sum estimated as representing the average amount of capital expended in

Deduction,—none in respect of gradual exhaustion of mine;

or, *semble*, in respect of of cost of sinking pits, etc.;

(*o*) (1877), 3 Ex. D. 23.
(*p*) (1881), 7 Q. B. D. 485.
(*q*) (1881), 6 App. Cas. 315.

sinking pits exhausted by the year's working—but it was suggested that, possibly, when the pit was sunk during the year of the assessment, and was also exhausted during that year, the deduction of the cost of sinking would be allowed.

or in respect of an indemnity payment.

Also, under the words "*money laid out wholly and exclusively for the purpose of the trade*," the miner may not deduct the sort of expenditure which was disallowed in the *Rhymney Iron Co.* v. *Fowler* (*r*),—such latter expenditure consisting of sums paid by way of purchasing an indemnity against the output of the colliery falling below a certain average ; which latter item of expenditure might well appear in the profit and loss account of a private trader or company, but it was not therefore an item of deduction authorised by the Income Tax Acts.

DEPRECIATION OF PLANT, YEARLY ESTIMATE OF.

Discretion as to mode of estimating deduction for depreciation.

In estimating the deduction which, under the 41 Vict. c. 15, s. 12, is to be allowed from trade profits on account of the year's wear and tear (or depreciation) of plant, it is not obligatory on the commissioners to take an average of the depreciations during the three preceding years ; but they may (in their discretion) adopt in their estimate the amount of the depreciation during the year immediately preceding the year of the assessment (*rr*).

MINE OR WORKS, WHEN NOT TAXABLE SPECIFICALLY AS SUCH.

Lessee who has never entered,—not taxable.

Where a mining lessee, who is liable to a minimum or certain rent whether he works the mine or not, never enters upon or works the demised mine, there are, of course, no profits of the concern for which he is chargeable to the income or property tax (*s*) ; and he (the lessee) would only become chargeable when he commenced to work ; and until then, the lessor is alone chargeable for the income tax on the minimum rent received by him,—so that if the lessee should, in such a case, pay the income tax, it would be a voluntary payment which he could not afterwards recover from the lessor ; nor, *semble*, can the lessee, in such a case, deduct the tax from the minimum rent (*t*).

(*r*) [1896] 2 Q. B. 79.
(*rr*) *Cunard Co.* v. *Coulson*, [1899] 1 Q. B. 865.
(*s*) *Taylor* v. *Evans* (1856), 1 H. & N. 101.
(*t*.) *Ibid.*

Royalties,—when taxable as "profits" merely.

In *Edmonds* v. *Eastwood* (*u*), which was the case of the demise of a brickfield at a fixed surface rent, and at a royalty or uncertain brickrent, it was held, that the royalty was not a "*casual profit*," but was an ordinary yearly profit arising or accruing from lands,—and consequently, if (as the court rather inclined to think) the brickfield was not taxable as a quarry, or as a mine, or as a works, within the specific rules applicable thereto, it was taxable as an ordinary profit of lands under the general rule applicable to lands within Schedule A.

Royalties, when merely *personal debts*,—not taxable at all.

In *Foley* v. *Fletcher* (*x*), where certain mines (lands and plant) were sold for a fixed price ; and the price was made payable by instalments, the first instalment being made payable on the completion of the purchase, and the other instalments being made payable half-yearly over a period of thirty years,—the court held, that the instalments were not in the nature of tonnage or acreage rents,—that is to say, of the royalties reserved in mining leases,—and so were not taxable to the income tax as such ; also, that the instalments were not annuities or other annual payments within the 5 & 6 Vict. c. 35, s. 102,—and so were not taxable to the income tax as such ; also, that the instalments were not annuities or other annual payments within the 16 & 17 Vict. c. 34, Schedule D.,—and so were not taxable to the income tax as such ; but that the instalments were the mere repayment of a *debt*,—the purchase money (while remaining unpaid) constituting a *debt* ; and that being so, these annual payments were not liable to income or property tax at all, which tax is only in respect of "*profits and gains*."

(*c*.) TITHE AND TITHE RENT-CHARGE.

Tithe and tithe rent-charge.

As regards tithe and tithe rent-charge,—minerals not being of the increase or produce of the earth, but being portion or parcel of the very soil itself, the general rule was, that, by the common law, tithes were not payable in respect either of mines or of quarries (*y*),—save possibly where the mines or quarries were regarded merely as parcel of other lands which were titheable. But, by special custom, or by local Act, mines and quarries might as such have been subject to tithe (*z*),—and

(*u*) (1858), 2 H. & N. 811.
(*x*) (1858), 3 H. & N. 769.
(*y*) 2 Inst. 651 ; *Amiles* v. *Chambers* (1670), 1 Mod. 35 ; 1 E. & Y. 480 ; *Stoutfil's Case* (1677), 2 Mod. 77 ; 1 E. & Y. 509 ; 6 Bac. Abr. 712.
(*z*) 2 Inst. 664.

this is recognised in the various Acts relative to the commutation of tithes (*a*); and, in Derbyshire, tithes are (or were) payable, by the custom of the country, in respect of the lead ore,—a full tenth being due in the High Peak, although a nineteenth only is usually taken; while in Wirksworth and elsewhere, a fortieth only is taken, or some other small money payment is made. A lime kiln,—or a salt works,—may also, by local custom, be subject to tithes (*b*),—*scil.*, specifically as such; but otherwise they would, *semble*, be titheable by the common law as land.

The tithes of mines (otherwise called mineral tithes) may be either in the nature of a predial tithe,—that is, of the ore in its natural state, without any deduction for expenses; or it may be in the nature of a personal tithe,—that is, with an allowance for labour and other incidental expenses (*c*).

The 6 & 7 Will. 4, c. 71, which provided for the commutation of tithes generally,—either (1) by voluntary parochial agreement confirmed by the tithe commissioners, or (2) by compulsory award of the commissioners,—did not, in its general provisions, extend to mineral tithes regarded specifically as such; but these tithes also might have been commuted by special provisions to be inserted in the parochial agreement, and to be confirmed by the commissioners (*d*); and under the 2 & 3 Vict. c. 62, the mineral tithes might be commuted by supplemental parochial agreement (*e*).

(*d.*) CHURCH RATES.

Church rates.

As regards church rates,—mines and minerals, where rateable at all to church rates, were not rateable specifically as such, but were rateable merely as lands (*f*),—these rates being charged on all lands and houses within the parish, and being assessed on the inhabitants; but since the year 1868, these rates have ceased to be compulsory (*g*), excepting in a few specially excepted cases.

(*a*) 6 & 7 Will. 4, c. 71, s. 90; 2 & 3 Vict. c. 62, s. 9.

(*b*) *Thomas* v. *Perry* (1617), 1 Roll. Abr. 642.

(*c*) *Brown* v. *Vermuden* (1677), 1 Ch. Cas. 272, 282; 1 E. & Y. 509; *Tully* v. *Halsall* (1666), 1 Wood, 74; *Pindar* v. *Jackson* (1693), 1 Wood, 315; 1 E. & Y. 583; *Basire* v. *Wharton* (1667), 1 Wood, 83; *Lord Lonsdale* v. *Bathurst* (1730), 2 Wood, 302; *Buxton* v. *Hutchinson* (1688), 2 Vern. 46.

(*d*) 6 & 7 Will. 4, c. 71, s. 90.

(*e*) Sect. 9.

(*f*) God. Append. 10, 11.

(*g*) 31 & 32 Vict. c. 109.

(*e.*) LOCAL RATES.

Local rates.

As regards local rates generally,—under the Rating Act, 1874 (*h*), the mines which were thereby for the first time made liable to the poor rate,—that is to say, all mines whatsoever (other than coal mines, which were already liable thereto),—were also made rateable to all *local rates* in like manner as if the Poor Law Acts had always extended to them; and "*local rate*" is defined by the Act (s. 15) as meaning any county rate, borough rate, highway rate, or other local rate leviable on property rateable to the relief of the poor.

(*a*) County rate;

And, Firstly, as regards the county rate,—By the 15 & 16 Vict. c. 81, s. 2, the basis or standard for preparing a "fair and equal county rate" is founded on (and is prepared rateably and equally according to) the "*full and fair annual value*" of the property, messuages, lands, tenements, and hereditaments rateable to the relief of the poor in every parish, township, borough, or place, whether parochial or extra-parochial, within (in effect) the county or other the limits of the quarter sessions jurisdiction (whether county or borough) (*i*). And (by s. 6) for the purposes of preparing such basis for the assessment of the county rate, the phrase "full and fair annual value" means the "*net annual value*" within the Poor Law Act; but the assessment is not within the provisions of the Union Assessment, 1862 (*k*), but is by the quarter sessions or a justices' committee thereof (*l*). All which provisions are (in effect) a re-enactment of the provisions contained in the repealed statute 55 Geo. 3, c. 51, whereby all property rateable to the relief of the poor was made liable to the county rate; and the court of quarter sessions was empowered to direct a "*fair and equal county rate*" to be made for all the purposes to which the county stock was or might be liable, and to assess every parish and township rateably and equally according to a certain pound rate of the "*full and fair annual value*" of the property.

(*b*) Borough rate;

Secondly, as regards the borough rate,—Where the borough fund is insufficient for the purposes to which it is applicable, the council of the borough may order a rate (called a borough rate) to be made in the borough,—the assessment being upon all the several parishes and parts of parishes in the borough in proportion to the total annual value of the hereditaments in each

(*h*) 37 & 38 Vict. c. 54.
(*i*) 45 & 46 Vict. c. 50, ss. 150—153.
(*k*) 25 & 26 Vict. c. 103.
(*l*) 51 & 52 Vict. c. 41, s. 8.

parish or part of a parish which are rateable to the poor,—and such annual value is the same as the poor law value (*m*).

(*c*) Highway rate;

Thirdly, as regards the highway rate,—By the 5 & 6 Will. 4, c. 50, s. 27, the rate required to be made, assessed, and levied by the surveyor of highways, was to be rated upon all property then liable to be rated and assessed to the poor rate,—it being also further provided, that the rate should also extend to (among other things) such mines and to such quarries of stone or other hereditaments as had theretofore been usually rated to the highways; and these latter provisions were held, in *Rex* v. *Randall* (*n*), to be general, and to be descriptive of the *character* of the mines to be then assessed and rated, and not to be limited to the particular mines then opened and then rated.

(*d*) General district rate; also, special district rate;

Fourthly, as regards the general district rate,—By the 10 & 11 Vict. c. 34, s. 175, the annual value of the messuages, lands, and hereditaments thereby made rateable in respect of improvements generally in towns, was to be ascertained by and according to the last preceding assessment for the relief of the poor,—provisions extended by the 10 & 11 Vict. c. 89 to the police rate and to kindred rates. And by the Public Health Act, 1875 (*o*), s. 211, a general district rate is authorised to be levied on the occupiers of all kinds of property for the time being by law assessable to the poor rate; and such rate is to be assessed on the full net annual value of such property, as ascertained by the valuation list for the time being in force, or otherwise according to the last past poor rate (*p*). Also, in particular districts, a special district rate may be imposed,—the theory being, that the whole area benefited shall be assessed equally (*q*),—and only the area which is benefited.

(*e*) Lighting and watching rate.

And, Fifthly, as regards the lighting and watching rate,—It is provided, by the 3 & 4 Will. 4, c. 90, s. 33, that the owners and occupiers of houses, buildings, and property (*other than land*) rateable to the relief of the poor in any parish, shall be rated at and pay a rate in the pound three times greater than that which the owners and occupiers of land are rated at; and the owners and occupiers of land are to be rated according to the valuation list made for the assessment of the poor rate.

(*m*) 45 & 46 Vict. c. 50, s. 144.
(*n*) (1855), 4 El. & Bl. 564.
(*o*) 38 & 39 Vict. c. 55.
(*p*) And see 53 & 54 Vict. c. 59, s. 4; 56 & 57 Vict. c. 73, s. 28.
(*q*) *Metropolitan Board of Works* v. *Vauxhall Bridge Co.* (1857), 7 E. & B. 964; *Knight* v. *Langport District Drainage*, [1898] 1 Q. B. 588.

In *Thursby* v. *Briercliffe-cum-Entwistle Overseers* (*r*), it was held, that coal mines were not *land* so as to fall under the lesser rate, but were property other than land rateable to the relief of the poor, and rateable on the higher scale. But in *Crayford Overseers* v. *Rutter* (*s*), where the property liable to be rated was land with engine-houses and other buildings upon it, occupied for the purposes of a brickfield,—the brick-earth being dug from a portion of the land and manufactured into bricks on other portions ; and the whole of the land was used exclusively for the business of brick-making,—the court held, that the whole property was properly rated as land,—that is to say, at the lower rate specified in the Act,—*scil.*, because the buildings on the land could not be rated apart from the land, for they were not capable of being put to any other than their then present use.

As regards boroughs within the Municipal Corporations Act, 1882 (*t*), it is provided by that Act (s. 197), that the watch rate thereby authorised to be made and levied shall be made on an estimate of the net annual value of the hereditaments rated thereto, that is to say, "of the rent at which, one year with another, they might in their actual state be reasonably expected to let from year to year, the probable annual average cost of the repairs, insurances, and other expenses necessary to maintain them in their actual state, and all rates, taxes, and public charges, except tithes or tithe commutation rent-charge (if any), being paid by the tenant."

EQUITABLE APPORTIONMENT OF RATE.

Land,—rating of, to drainage rate.

A sewers' rate (or a drainage rate), imposed by public commissioners by virtue of a sewer (or drainage) Act, is to be assessed, equally according to their value, on all lands and tenements within the drainage district which derive any benefit from the drainage works,—and is not to be assessed differentially in proportion to the amount of the benefit which they respectively derive (*u*) ; but an estate, a small portion only of which is within the drainage district and benefited thereby, would, *semble*, be valued for the purposes of the assessment only in respect of the part within the district (*x*).

(*r*) [1894] 2 Q. B. 11 ; [1895] A. C. 32.
(*s*) (1887), 1 Q. B. 650.
(*t*) 45 & 46 Vict. c. 55.
(*u*) *Knight* v. *Langport District Drainage*, [1898] 1 Q. B. 588.
(*x*) *Metropolitan Board* v. *Vauxhall Bridge* (1857), 7 El. & Bl. 964.

(iii.) Death Duties.

Succession duty,—payable, specifically, in respect of *opened* mines;

By the Succession Duty Act, 1853 (*a*), by which (s. 2), as regards devolutions on deaths happening after May 19th, 1853, succession duty was made payable by the person who (on the death) succeeded to the possession and enjoyment of any real estate, it was specifically provided (by s. 26) as to mines, that the annual or yearly value of any "*opened*" mine should either be calculated upon the average profits or income derived therefrom (after deducting all necessary outgoings) during a period of years to be agreed upon between the successor and the Government; or else (failing such agreement) should be calculated on the principal value of the mine (which principal value was, for this purpose, to be ascertained),—in which latter case, the annual or yearly value of the mine was to be the amount of the interest at 3 per cent. on the principle value. And if the period for the average profits was to be agreed upon, it must have been agreed between the date of the death and the date when (*i.e.*, one year after the death) the first instalment of the duty became payable (s. 26),—and it could not (save by way of indulgence, possibly) have been agreed later; and the successor was, in every case, required to give notice to the Government of the succession immediately (*i.e.*, within a reasonable time, say a month) from the death (s. 45).

but not payable, at least specifically, in respect of *unopened* mines.

The Act was confined to *open* mines, and did not extend to include any *unopened* mines,—that is to say, specifically as mines; and the reason for that was, because the duty was leviable only in respect of a profitable occupation, possession, or enjoyment (*b*), and an unopened mine (as such) was not in the profitable occupation of any one.

Estate duty,—payable in respect of all mines;

By the Finance Act, 1894 (*c*),—by which, as regards devolutions on deaths happening on or after August 2nd, 1894, estate duty has been made payable by the legal personal representative of the deceased owner or (as regards real estate) by the person succeeding thereto,—such duty being made payable in respect of the inheritance (or *corpus*), of the real estate devolving (*i.e.*, "passing") on the death (*d*),—and the whole estate (real and personal) of the deceased, being, for the purpose of fixing the *rate* of duty, aggregated into one estate (s. 4),—the duty is

if not specifically, at least generally as enhancing the value of the estate;

(*a*) 16 & 17 Vict. c. 51.
(*b*) *Att.-Gen.* v. *Sefton* (1863), 32 L. J. Exch. 230; (1865), 34 L. J. Exch. 98.
(*c*) 57 & 58 Vict. c. 30.
(*d*) *In re Parker-Jervis*, [1898] 2 Ch. 643.

to be assessed on the "principal value" of the estate; and as regards such principal value, the Act provides (s. 7), that it shall be what the Inland Revenue Commissioners shall estimate to be "the price which the property would fetch if sold in the open market at the date of the death,"—the estimate being, of course, arrived at upon due materials, and not without first hearing the parties concerned, if they desire to be heard.

and even although the mines should be *unopened*.

And, *semble*, it rather appears to follow from the general purport of the Act,—although the Act contains no specific provision to that effect,—that mines, as well *unopened* as opened, are subject to the duty. In other words, it rather appears to follow, that mines (whether opened or unopened) must be included in the commissioners' estimate of the principal value, —specifically, in the case of opened mines; and generally, although not specifically, in the case of unopened mines,—that is to say, if the mines are known to exist within and under the real estate, then the value of the real estate will be enhanced by the existence of the mines, even although the mines are unopened,— so that this value would enter into the commissioners' estimate, as being parcel of the real estate, although not as being specifically mines or colleries.

And, *semble*, the succession duty is now like the estate duty in that particular.

And the Finance Act, 1894, having (by s. 18 (2)) enacted, that the principal value required to be ascertained (when not agreed) for the purposes of the succession duty shall be ascertained in the same manner as it is (under the Act) to be ascertained for the purposes of the estate duty, it seems to follow, that mines, although unopened, must now have some value attributed to them,—not specifically as mines, but as enhancing the value of the real estate generally; and if this view be the correct view, the provisions of the Act are an adoption (in effect) of the opinion expressed by MARTIN, B., in *Att.-Gen.* v. *Sefton* (*e*).

Settlement estate duty.

And all these observations regarding the estate duty apply also, *semble*, to the settlement estate duty imposed by the Finance Act, 1894, when the estate is in settlement.

(*e*) (1863), 32 L. J. Exch. 230, at pp. 233, 234.

CHAPTER XV.

ON THE CIVIL LIABILITY OF EMPLOYERS FOR PERSONAL INJURIES,—AND ON THE STATUTES REGULATIVE OF THE RELATIONS BETWEEN MASTERS AND WORKMEN.

(i.) Liability at the common law.

General Principle.

Employer,—liability of, for act of employee.

Employers are, generally, responsible for the acts of their employees, in accordance with the maxim of law, *respondeat superior* (*a*) ; and their managers are not, in the general case, responsible (*b*) ; and the master's employment of a sub-contractor is not—or is not invariably—an exemption of the master (*c*) ; and an employer will also be liable for specific acts directed by him to be done (*d*).

General Principle, Limits to its Application.

Employer,—when not liable.

However, a master is not, by the common law, answerable for the wilful or unlawful acts of his workman, nor for any acts done by the workman outside of his employment (*e*),—that is to say, he is not civilly responsible, although he may be otherwise liable, *e.g.*, to an indictment for creating a nuisance in fouling a stream by colliery refuse (*f*). Also, where the employer engages a sub-contractor, the question of the civil liability of the master depends, in all cases, on the preliminary question, who is the master (*g*),—because, generally, an employer is not responsible for damages occasioned by the negligence of a person

(*a*) *Littledale* v. *Earl of Lonsdale* (1791), 2 H. Bl. 268.

(*b*) *Stone* v. *Cartwright* (1795), 6 T. R. 411.

(*c*) (1799), 1 Bos. & P. 409, *per* Heath, J.

(*d*) *Lyons* v. *Martin* (1838), 8 A. & E. 512 ; *Jarmain* v. *Hooper* (1843), 6 M. & G. 827 ; *Freeman* v. *Rosher* (1849), 18 L. J. (N.S.) Q. B. 340 ; *Gregory* v. *Piper* (1829), 9 Barn. & C. 591.

(*e*) *M'Manus* v. *Crickett* (1800), 1 East, 106 ; *Morley* v. *Gaisford* (1795), 2 H. Bl. 442 ; *Brown* v. *Copley* (1844), 7 M. & G. 559 ; and see *Limpus* v. *London General Omnibus Co* (1862), 1 H. & C. 526.

(*f*) *R.* v. *Stephens* (1866), 35 L. J. Q. B. 251.

(*g*) *Bush* v. *Steinman* (1799), 1 Bos. & P. 404 ; *Ellis* v. *The Sheffield Gas Consumers' Co.* (1853), 2 El. & B. 767 ; 23 L. J. (N.S.) Q. B. 42 ; *Overton* v. *Freeman* (1852), 21 L. J. (N.S.) C. P. 52 ; *Rapson* v. *Cubitt* (1842), 9 M. & W. 710 ; *Holliday* v. *National Telephone Co.*, [1899] 2 Q. B. 392.

employed by him in a lawful work, *unless the parties stand in the relation of master and servant* (*h*).

Lessee or licensee,—liability of, an exemption.

Also, where mines have been demised by way either of an actual lease or of a license to work, the civil responsibility is removed from the lessor or licensor, and attaches to the lessee or licensee,—*scil.*, because the lessee or licensee acquires a distinct right in the property; but, in exceptional cases, the lessor or licensor (*i*) will remain civilly responsible.

Sub-contractor,—liability of,—when an exemption, and when not.

The employment of a sub-contractor will be no exemption of the principal employing him,—where the damage is wholly unauthorised; or where the occurrence of the damage, unless special precautions were adopted to avoid it, might reasonably have been foreseen from the execution of the works (*k*). However, in *Marrow* v. *Flimby, etc. Coal, etc. Co.* (*l*), where the defendants (colliery owners) employed E. as a contractor to sink a shaft in their colliery,—E. providing his own workmen, and being paid as the work progressed; and one of E.'s workmen, while employed in sinking the shaft, was killed; and his administratrix sued the defendant company under the 43 & 44 Vict. c. 42, for damages for his death,—the court held that the defendant company was not liable,—because E. was an independent contractor, and his workmen were not the defendant company's workmen within the meaning of the Act sued under; and the provisions of the Coal Mines Regulation Act, 1887 (*m*), or the special rules made thereunder for the particular colliery, made no difference.

INJURIES TO THE EMPLOYER'S OWN WORKPEOPLE.

Injury by servant to fellow-servant,—master, when liable, and when not.

For a personal injury sustained by the workman himself,—*i.e.*, in the course of his employment and at the hands or through the negligence of a fellow-workman, the master was, by the common law, exempt from all civil liability, as a general rule,—the reason given for this exemption of the master having been, that the servant accepted the risk when he accepted the employment (*n*). However, even by the common law, the master was bound to provide for the safety of his workmen, as far as

(*h*) *Butler* v. *Hunter* (1862), 7 H. & N. 826; 31 L. J. Exch. 214.

(*i*) *Rosewell* v. *Prior* (1702), 2 Salk. 460.

(*k*) *Ellis* v. *Sheffield Gas Consumers' Co.* (1853), 2 El. & Bl. 767; *Bower* v. *Peate* (1876), 1 Q. B. D. 321; *Tarry* v. *Ashton*, *ibid.* 314.

(*l*) [1898] 2 Q. B. 588.

(*m*) 50 & 51 Vict. c. 58.

(*n*) *Dynen* v. *Leech* (1857), 26 L. J. Exch. 221; *Bartonshill Coal Co.* v. *Reid* (1858), 3 Macq. 295.

could reasonably be expected ; and, in works of a dangerous character, he was bound to protect his workmen against avoidable risks. Therefore, where an employer interfered personally, he would have been liable for want of due care (*o*) ; and whether he interfered personally or had deputed his authority to an agent or manager, he would have been liable, for not providing the proper machinery (*p*), or for any defect therein or in the fencing of the machinery when dangerous (*q*). But where the proper machinery was provided, and was duly kept in repair and fenced, the master was exempt from all liability for an injury occasioned by its negligent use (*r*).

"Common employment,"—extent of the principle of.

The rule of the common law, by which a master was not liable to his workman for injuries sustained from the negligence of a fellow-servant in the "*common employment*," was not altered by the fact that the servant by whose negligence the injury was caused was a servant in authority, whose lawful directions the other was bound to obey (*s*),—provided only the master had exercised due care in the selection of such superior servant (*t*).

FOOLHARDINESS, CONTRIBUTORY NEGLIGENCE, ETC.

And, of course, the master was not liable, where the injury was attributable to the foolhardiness,—or to the contributory negligence,—of the workman himself (*u*) : and the master was not liable to a volunteer servant,—for *volenti non fit injuria* (*x*).

The defence of "common employment" required, of course, that the two workmen (the one injured and the one injuring him) should both be in the service of a common master (*y*).

(*o*) *Roberts* v. *Smith* (1857), 2 H. & N. 213 ; 26 L. J. Exch. 319 ; *Brydon* v. *Stuart* (1855), 2 Macq. 34.

(*p*) *Bartonshill Coal Co.* v. *Reid, supra* ; *Brown* v. *The Accrington Cotton Spinning Co.* (1865), 34 L. J. Exch. 208 ; 3 H. & C. 511.

(*q*) *Holmes* v. *Clarke* (1861), 30 L. J. Exch. 135.

(*r*) *Griffiths* v. *Gidlow* (1858), 3 H. & N. 648 ; 27 L. J. Exch. 404.

(*s*) *Feltham* v. *England* (1866), L. R. 2 Q. B. 33 ; *Wilson* v. *Merry* (1868), L. R. 1 H. L. Sc. 326 ; *Rourke* v. *White Moss Colliery Co.* (1877), 2 C. P. D. 205.

(*t*) *Howells* v. *Landore Siemens Steel Co.* (1874), L. R. 10 Q. B. 62.

(*u*) *Senior* v. *Ward* (1859), 1 E. & E. 385 ; 28 L. J. Q. B. 139 ; *Seymour* v. *Maddox* (1851), 16 Q. B. 326 ; 20 L. J. Q. B. 327 ; *Witherley* v. *The Regent's Canal Co.* (1862), 12 C. B. (N.S.) 2 ; *Hall* v. *Johnson* (1865), 3 H. & C. 589 ; 34 L. J. Exch. 222.

(*x*) *Degg* v. *Midland Rail. Co.* (1857), 1 H. & N. 773 ; 26 L. J. Exch. 171 ; *Holmes* v. *North Eastern Rail. Co.* (1871), L. R. 4 Exch. 254 ; L. R. 6 Exch. 123 ; *Wright* v. *London and North Western Rail. Co.* (1875), L. R. 10 Q. B. 298 ; *Thomas* v. *Quartermaine* (1887), 18 Q. B. D. 685 ; *Williams* v. *Birmingham Metal Co.*, [1899] 2 Q. B. 338.

(*y*) *Johnson* v. *Lindsay*, [1891] A. C. 371.

DEATH DAMAGES.

By Lord Campbell's Act (*z*), whenever death ensues from any wrongful act, neglect, or default,—whether of an employer or of any stranger,—the person who would have been liable to an action, if the person injured had not died, is declared to be and remain liable, although the death should be felonious. But the action must be brought within twelve calendar months from the death,—either by the legal personal representatives of the deceased,—or (if they fail for the first six months of the twelve, or if there is no such legal representative) by the persons (or by any of the persons) among whom the damages would be divided, namely, the wife, husband, parents, and children. And for the success of the action, there must have been a reasonable expectation of pecuniary advantage to the surviving relatives, if the death had not occurred (*a*) ; also, no compensation would be recoverable, where the deceased workman should have validly agreed (by express agreement in writing) not to claim compensation for any injury (*b*).

Damages for death,—recovery of ;

and right to, when excluded.

PIT-BONDS, AND OTHER SPECIAL WORKMEN'S AGREEMENTS.

Written agreements (sometimes called "pit-bonds") are often (or used at one time to be) entered into by miners for short specified periods ; and these agreements may or may not also amount to contracts of service generally (*c*).

Pit-bonds.

Where the written agreement between a collier and an owner was to the effect, that the collier should be paid fortnightly wages, and should give his exclusive service, and should not leave the service without giving twenty-eight days' notice, or until after the expiration of such notice ; and the employer on his part also agreed, that the collier should not be discharged without the like notice,—the contract was held to be a valid one ; and it was not void for want of mutuality, as the employers were bound by implication to pay the collier reasonable wages

Other special agreements.

(*z*) 9 & 10 Vict. c. 93, amended by 27 & 28 Vict. c. 95.

(*a*) *Blake* v. *Midland Rail. Co.* (1852), 18 Q. B. 93 ; 21 L. J. Q. B 233 ; *Rowley* v. *London and North Western Rail. Co.* (1873), L. R. 8 Exch. 221.

(*b*) *Griffiths* v. *Dudley* (1882), 9 Q. B. D. 357.

(*c*) *Williamson* v. *Taylor* (1843), 5 Q. B. 175 ; 1 D. & M. 398 ; 13 L. J. (N.S.) Q. B. 81. See *R.* v. *Byker* (1823), 2 B. & C. 114 ; *R.* v. *St. Helens* (*Auckland*) (1833), 4 B. & Ad. 718 ; *R.* v. *Walbottle* (1846), 9 Q. B. 248 ; 15 L. J. (N.S.) M. C. 153.

and to find him work (*d*). And even an infant may enter into a contract of this kind; but if it is not beneficial to himself, he may avoid the contract at any time (*e*).

Workmen,—when they are contractors and not servants.

It is (or it used to be) not unusual for miners to enter into contracts to raise coal or ore from the workings for a certain period,—say, for three, six, or twelve months,—each miner engaging to labour for a certain number of hours in the week and to make his drift of a specified height and width, and the employer engaging to pay the workmen a certain sum for every specified quantity of coal or measure of ore gotten or raised within the time (*f*); and, under such a contract, the relation of contractor and contractee (and not that of master and servant) is created (*g*); and the contract may even amount to a partnership (*h*); and the statutory provisions hereinafter mentioned, which are regulative of the relations between masters and workmen, have no application to that class of contracts (*i*).

(ii.) Liabilty under statute.

THE STATUTES.

Employers and employees,—the statutes regulative of their relations,—enumeration of.

The civil liability of masters, as it existed (and still exists) by the common law having been (and being) such as is above stated, it is convenient to nextly consider the statutory liabilities of the master for personal injury sustained by his workmen, and the statutory relations generally between employers and employed (otherwise between masters and workmen),—so far as these statutory provisions have any applicability to mines and minerals.

Now the principal statutes regulative of the relations between masters and workmen are the following, and may be grouped as follows, that is to say :—

I. The Employers Liability Act, 1880 (43 & 44 Vict. c. 42), and the Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37).

(*d*) *Whittle* v. *Frankland* (1862), 2 B. & S. 49; 31 L. J. M. C. 81. See *Nowlan* v. *Ablett* (1835), 2 C. M. & R. 57.

(*e*) *Wood* v. *Fenwick* (1842), 10 M. & W. 195; 11 L. J. (N.S.) M. C. 127; *R.* v. *Lord* (1848), 12 Q. B. 757; 17 L. J. (N.S.) M. C. 181.

(*f*) *Bull* v. *Price* (1831), 7 Bing. 237; 5 Moo. & P. 2.

(*g*) *Hardy* v. *Ryle* (1829), 9 B. & C. 603; *Taylor* v. *Porter* (1862), 31 L. J. M. C. 111.

(*h*) *Peacock* v. *Peacock* (1809), 16 Ves. 49; *Reid* v. *Hollinshead* (1825), 4 B. & C. 878; 7 Dow. & R. 444.

(*i*) *Davies* v. *Baron Berwick* (1861), 30 L. J. M. C. 84.

II. The Truck Acts, 1831 to 1896,—being the 1 & 2 Will. 4, c. 37 ; the 50 & 51 Vict. c. 46 ; and the 59 & 60 Vict. c. 44.

III. The Trades Union Acts, 1871 and 1876,—being respectively the 34 & 35 Vict. c. 31, and the 39 & 40 Vict. c. 22 ; and the Molestation Act, 1871 (34 & 35 Vict. c. 32).

IV. The Factory and Workshops Acts, 1878 to 1895,—being respectively the 41 & 42 Vict. c. 16 ; the 46 & 47 Vict. c. 53 ; the 54 & 55 Vict. c. 75 ; and the 58 & 59 Vict. c. 37.

V. The [now repealed] Master and Servant Act, 1867 (30 & 31 Vict. c. 141) ; and the Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90) ; and the Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86) ; and

VI. The Conciliation Act, 1896,—being the 59 & 60 Vict. c. 30, and which repealed the 5 Geo. 4, c. 96, the 30 & 31 Vict. c. 105, and the 35 & 36 Vict. c. 46 (called respectively the Masters and Workmen Arbitration Act, 1824 ; the Councils of Conciliation Act, 1867 ; and the Masters and Workmen Arbitration Act, 1872).

(*a.*) EMPLOYER'S LIABILITY ACT, 1880, AND WORKMEN'S COMPENSATION ACT, 1897.

The general effect of these two Acts may be stated as follows :

(1) Employers' Liability Act, 1880,—rights and remedies under.

The Act of 1880 provides, that, for any personal injury occasioned to a workman,—by reason of any defect in the machinery or plant (including the ways and works), or by reason of the negligence of any superintendent workman, or by reason of any compliance with the byelaws and regulations of the employer or with any particular directions or instructions of his superintendent,—the workman or (in case of his death) his representatives are entitled to recover against the employer (unless the workman has either expressly (*k*) or impliedly (*l*) contracted away such right) the like compensation as if the workman had not been a workman (s. 1) (*m*). But when the injury arises from a defect in the machinery or plant, negligence on the part of the employer (or his

(*k*) *Griffiths* v. *Dudley* (1882), 9 Q. B. D. 357.

(*l*) *Thomas* v. *Quartermaine* (1887), 18 Q. B. D. 685.

(*m*) *Ibid.*

agent) must be shown (s. 2),—plant or machinery which was unsuitable for the purpose being deemed defective (*n*); and where the injury arises from the workman's compliance with the byelaws and regulations of the employer, or with the particular directions or instruction of his superintendent, an impropriety or defect in the byelaws, regulations, or instructions, must be shown (s. 2); and in any case, the workman must not have known of the defect or negligence, or (if he knew it) must have brought it to the notice of the employer (s. 2); and the workman must also otherwise bring himself, and his case, within the provisions of the Act (*o*). And the maximum compensation recoverable is the estimated amount of the last three years wages of the injured workman (s. 3); and notice of the injury (the notice being in writing) (*p*), must have been given within six weeks; and the action (which is to be in the county court) (s. 6) must be commenced within six months from the injury, or (in case of death) within twelve months from the death (s. 4).

(2) Workmen's Compensation Act, 1897,—rights and remedies under.

The Act of 1897 provides, that, for any personal injury occasioned to a workman,—by *accident* arising out of and in the course of the employment,—being an employment to which the Act applies, and in the course of such employment (*q*),—the employer shall be liable to pay compensation to the workman (or to his representatives), the compensation being according to the scale set forth in the First Schedule to the Act (s. 1); but no compensation under the Act is recoverable, unless there is a disablement for two weeks; or if the accident was due to the "serious and wilful misconduct" of the workman himself (s. 1 (2)). The amount of the compensation (failing agreement) is to be settled by arbitration in accordance with the rules set forth in the Second Schedule to the Act. When the accident was occasioned by (or is attributable to) the "personal negligence" or the "wilful act" of the employer (or of his agent), the workman may either proceed under the Act (to recover the compensation thereby provided) or may (at his option) proceed altogether apart from the Act (to recover compensation or damages for the injury)

(*n*) *Heske* v. *Samuelson* (1883), 12 Q. B. D. 30; *Cripps* v. *Judge* (1884), 13 Q. B. D. 583.

(*o*) *McGiffin* v. *Palmer's Shipbuilding Co.* (1882), 10 Q. B. D. 5.

(*p*) *Moyle* v. *Jenkins* (1881), 8 Q. B. D. 116.

(*q*) *Lowe* v. *Pearson*, [1899] 1 Q. B. 261; and see *Mellor* v. *Tomkinson*, [1899] 1 Q. B. 374; *Holness* v. *Mackay*, [1899] 2 Q. B. 319.

(s. 1 (2)); but, for all accidents occasioned otherwise, the workman must proceed under the Act, and cannot proceed otherwise (s. 1 (2)). In order to recover compensation under the Act, notice of the accident must have been given as soon as practicable after its occurrence; and the claim must be made within six months from the injury, or (in case of death) within six months from the death (s. 2). The workman may not contract himself out of the Act,—excepting that any scheme for accidents compensation, which has been certified by the registrar of friendly societies to be as favourable to him (and to his fellow-workmen) as the provisions of the Act, may be accepted in substitution for the Act (s. 3),—while and so long as such certificate remains in force and unrevoked (s. 3 (4)),—all prior contracts whereby the workman has contracted away his right of compensation being determined (s. 9). And the employer is in all cases liable,—although there may be a contractor under him who would (at the common law) be liable,—and the employer has in that case a right of indemnity against the contractor (s. 4); but the workman is left free to either proceed under the Act (for the compensation thereby provided) or to proceed against the contractor (for the compensation or damages recoverable against him) (s. 6).

(*b.*) TRUCK ACTS, 1831—1896.

(1) Truck Act, 1831,—provisions of.

"Workmen."

Wages,—payment of, in cash, and unconditionally;

These Acts apply to all "*workmen*" as defined by the 38 & 39 Vict. c. 90, s. 10,—that is to say, all persons (other than domestics or menials) who being labourers, servants in husbandry, journeymen, artificers, handicraftsmen, miners, or otherwise engaged in manual labour, have entered into (or work under) a contract with an employer, — the contract being either oral or in writing, express or implied, and being either a contract of service or a contract to personally do any work or labour; and the workman may be either under twenty-one years of age or above that age,—the Act of 1831 having received this extended application from the Act of 1887 (*r*). And the Acts provide, that the workman's wages shall be payable in the current coin of the realm only (*s*), and not otherwise (save, under special circumstances, in Bank of England notes); and every contract to the contrary is declared

(*r*) 50 & 51 Vict. c. 46, s. 2.

(*s*) *Hewlett* v. *Allen*, [1894] A. C. 383.

void (*t*). Also, any contract (or provision in a contract) with respect to the place where, or the manner in which, or the person or persons with whom, the wages (or any part thereof) shall be laid out or expended, is also declared void (*u*),—nor may any condition to that effect be made by the employer as a term of employing the workman (*x*) ; nor may the employer dismiss any workman for not laying out or expending his wages in that way (*y*). Also, goods may not be given in whole or in part for the workmen's wages (*z*),—and the workman may (by action) recover his full wages, without any set-off of the price of such goods (*a*) ; and the workman cannot be sued for the price of the goods (*b*). And where, by the custom of the country, or by agreement or otherwise, any part of the wages is payable in anticipation, the employer may not withhold the advance, or deduct any discount or interest in respect thereof (*c*).

even where the payment is in advance.

"Stoppages," —and "allowances."

However, by s. 23 of the Act of 1831, the employer (or his agent) may supply the workman with medicine or medical attendance, or with fuel, or (in the case of miners) with materials, tools, and implements, or with hay, corn, or provender, for his beasts ; and may also demise or lease to the workman a tenement or part thereof at a rent, and supply him with cooked food—and may stop the amount thereof (*scil.*, the real and true value thereof and not more) out of the wages, if there is a written contract for such stoppage (*d*) ; and under the Act of 1851, s. 4, a cottage may be demised (or other allowance made) to a servant in husbandry, in addition to his money wages. But, as regards workmen generally, no deduction may be lawfully made from the wages, on account of sharpening or repairing the workman's tools (*e*).

(2) Truck Act, 1896,— "deductions" under.

Under the Act of 1896, the following deductions are allowed, if the provisions in that behalf of the Act are complied with, that is to say :—By s. 1, deductions on account of fines ; by s. 2, deductions on account of damaged goods or negligent work ; and by s. 3, deductions on account of or for or in respect of the use or supply of "materials, tools, or machines ; or of standing room, light, or heat," or the like,—the Act requiring, that in each case there shall be a contract to that effect, either in

(*t*) Act 1831, s. 1.
(*u*) *Ibid.* s. 2.
(*x*) Act 1887, s. 6.
(*y*) *Ibid.*
(*z*) Act 1831, s. 4.
(*a*) *Ibid.* s. 5.
(*b*) *Ibid.* s. 6 ; Act 1887, s. 5.
(*c*) Act 1887, s. 3.
(*d*) *Chawners* v. *Cummings* (1846), 8 Q. B. 311 ; *Archer* v. *James* (1859), 2 B. & S. 61 ; *Lamb* v. *Great Northern Rail. Co.*, [1891] 2 Q. B. 281.
(*e*) Act 1887, s. 8.

writing, or else in a notice affixed and kept in a place accessible to the workman; and the contract or notice must be very specific as regards every ground for the proposed reduction, and a written particular of the deductions must (on every occasion of their being made) be handed to the workman; and any deductions made otherwise than in accordance with these provisions may be recovered by the workman as wages due and unpaid (*f*); but none of these provisions affect persons employed in mines who are paid according to the weight of the mineral gotten.

Breach of the Acts,—liability for.

Any breach of the Acts is punishable as an offence against the Acts (*g*), the employer and his managing agent being equally liable (*h*),—but the master-employer being permitted to excuse himself, by bringing the actual offender (the agent) before the court and by showing that he (the master) used due diligence to enforce the provisions of the Acts; and in the case of mines, if the inspector of mines is satisfied that the master is not to be blamed, and that the agent (and he only) is to blame for the breach of the provisions of the Act, then the offence is to be charged against the actual offender only, without first proceeding against the master (*i*).

Contractors,—not within the Acts.

A person employed in loading ironstone at a certain rate per ton, who was not bound to give his own labour, and who employed others chiefly, working himself only occasionally, was held not to be within the Truck Act, 1831 (*j*).

"Butty colliers,"—not within the Acts.

Two or more working colliers, who enter into an agreement with their employers to get coal or ironstone from certain pits, at a certain rate per ton or per yard, are called butty colliers; and although they work themselves, yet they mostly employ also other men, for whose wages they are responsible; and accordingly, they are not workmen within the Acts, but are themselves employers (*k*). Also, generally, superintendents of workmen are not workmen within the meaning of the Acts (*l*).

(*f*) Act 1896, s. 5; *Cutts* v. *Ward* (1867), L. R. 2 Q. B. 357; *Pillar* v. *Llynvi Coal Co.* (1869), L. R. 4 C. P. 752.

(*g*) *Ashersmith* v. *Drury* (1858), 28 L. J. M. C. 5.

(*h*) Act 1831, s. 9; Act 1887, s. 12.

(*i*) Act 1887, s. 12.

(*j*) *Sharman* v. *Sandars* (1853), 22 L. J. (N.S.) C. P. 86; 13 C. B. 166; *Archer* v. *James* (1859), 1 Cox M. C. 2.

(*k*) *Bowers* v. *Lovekin* (1855), 6 El. & B. 584; 25 L. J. Q. B. 371; *Weaver* v. *Floyd* (1852), 21 L. J. Q. B. 151; *Ingram* v. *Barnes* (1857), 7 El. & B. 115, 132; 26 L. J. Q. B. 319; *Sleeman* v. *Barrett* (1864), 2 H. & C. 934; 33 L. J. Exch. 153.

(*l*) *Hunt* v. *Great Northern Rail. Co.*, [1891] 1 Q. B. 601.

(c.) TRADES UNION ACTS, 1871, 1876,—AND MOLESTATION ACT, 1871.

(1) The Trade Union Acts, 1871, 1876: (a) Act, 1871, —provisions of.

The Trades Union Act, 1871, legalised trade unions (*m*),—a trade union (within the meaning of the Act) being "any combination, whether temporary or permanent, for regulating the relations between workmen and masters, or between workmen and workmen, or between masters and masters, or for imposing restrictive conditions on the conduct of any trade or business" (*n*) ; but the Act at the same time enacted (by s. 4), that no action should lie to enforce (or to recover damages for the breach of) any agreement between the members, in restraint of their freedom as to selling their goods or as to hiring their services ; or any agreements as to the payment of subscriptions to the union, or as to the application of the funds of the union for certain specified purposes ; or any agreements between one union and another union. And the utmost that the Act did was simply (in effect) to declare that no such agreements should be illegal.

The Act also provided (by s. 5) that no trade union should be capable of being registered under the Friendly Society Acts or under the Companies Acts ; but otherwise the Act provided for the registration of the trade union as such (s. 13),—for which purpose, seven or more members were required to subscribe their names to the rules of the union (s. 6) ; and upon such registration, the union was entitled to acquire buildings and other property for the purposes of the union (s. 7),—all such property being vested in trustees for the benefit of the union and its members (s. 8) ; and these trustees, as well as the treasurer and other officers of the union, were rendered accountable as such, and might be punished for any abuse of their trust or office (ss. 9—12). Also, upon registration, the trade union was required to register an office within seven days (s. 15) ; and it was required also to send to the registrar of trades unions an annual return of its assets and liabilities, receipts and expenditure, together with a note of any alteration in its rules or change in its officers (s. 16).

The rules of the union (a copy of which was required to be delivered to every person on payment of one shilling) were required (by s. 14) to specify the name of the union, and its

(*m*) Act 1871, ss. 2, 3. (*n*) Act 1876, s. 16.

place of meeting; and to state also the whole objects of the union, and the terms and conditions of membership; and to contain provisions for the appointment and removal of its officers, and for the investment of the funds of the union, and for the audit and inspection of its accounts and books. And (by s. 18) to publish or circulate any false rules was made a misdemeanour.

(b) Act, 1876, —provisions of.

The Trade Union Act, 1876, provides (by s. 11) for the union changing its name; and (by s. 12) for the union amalgamating with another union or with other unions,—the change or amalgamation being in every case registered (s. 13). And it enacts (by s. 2), that any union (whether registered or unregistered) which insures the payment of money on the death of any child under ten years of age, shall be subject to the provisions for the safety of infant life which are contained in s. 28 of the Friendly Societies Act, 1875 (*o*); and (by s. 9) that minors (being above the age of sixteen years) may become members of the union, with full legal capacity; and (by s. 10) that any member may, by writing under his hand,—to be delivered at or sent to the registered office of the union,—nominate the beneficiary to whom any moneys (not exceeding 50*l.*) payable on the member's death shall be paid on such death; and a member may, in like manner, revoke the nomination and make a new nomination,—the moneys being payable only on the death of the member to his nominee.

Dissolution of union.

And with respect to the dissolution of trade unions, the Act provides (by s. 14), that the rules of the union shall provide for the manner of its own dissolution; and requires that notice of the dissolution, under the hand of the secretary and seven members of the union, shall within fourteen days after the dissolution be sent to the central office established under the Friendly Societies Acts, and shall be registered therein,—the rules of any trade union already registered not being, of course, by that provision, invalidated, if it should happen that they contain no provision for dissolution.

(2) Molestation Act, 1871,— provisions of.

The Molestation Act, 1871,—which (by s. 7) repealed the 6 Geo. 4, c. 129, whereby combinations of workmen were declared illegal,—enacts (by s. 1), that any person who shall use violence to any person or to any property,—or who shall threaten or intimidate, or molest or obstruct, any other person, with a

(*o*) 38 & 39 Vict. c. 60.

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view to coercing him (being a master) to dismiss or cease to employ any workman, or (being a workman) to quit any employment, or to return work before it is finished ; or (being a master) not to offer, or (being a workman) not to accept, any employment or work ; or (being a master or workman) to belong or not to belong to any temporary or permanent association or combination : or (being a master or workman) to pay any fine or penalty imposed by any temporary or permanent association or combination ; or (being a master) to alter the mode of carrying on his business, or the number or description of any person employed by him,—shall be liable (under an order of any court of summary jurisdiction) to be imprisoned, with or without hard labour, for a term not exceeding three months. And the Act defines molestation or obstruction,—as persistently following a person about from place to place ; or hiding his tools, clothes, or other property, or depriving him of or hindering him in the use thereof ; or watching or besetting the house or other place where he resides or works or carries on business, or happens to be, or the approach to such house or place ; or (with two or more other persons) following him in a disorderly manner in or through any street or road (*oo*).

(*d.*) FACTORY AND WORKSHOP ACTS, 1878—1895.

Factory, etc., Acts,—duty to fence, etc., under.

These Acts contain certain minute provisions for the health and safety of work-people,—including provisions for the fencing of fly-wheels, mill-gearing, and other dangerous machinery ; and provisions regulative of the employment of children, young persons, and women ; and provisions relative to accidents causing death or serious bodily injury,—and these provisions are enforced by penalties. The Acts contain also specific provisions regarding certain unusually dangerous businesses, such as white-lead factories (*p*), grinding-shops (*q*), etc.

The Acts,—are applicable to pit-banks, quarries, etc.

The Acts are applicable to (among other works) blast furnaces, smelting works, copper-mills, iron-mills, foundries ; and also to quarries, that is to say, any place (not being a mine) in which slate, stone, coprolites, or other minerals are worked or gotten ; and to pit-banks (so far as they are not within the Mines Regulation Acts, 1872—1887),—although, under the former Factory Acts (now repealed), a slate-quarry (*r*) or a cement works (*s*) was not deemed either a factory or a workshop.

(*oo*) *Lyons* v. *Wilkins*, [1899] 1 Ch. 255.
(*p*) 46 & 47 Vict. c. 53.
(*q*) 58 & 59 Vict. c. 37.
(*r*) *Kent* v. *Astley* (1869), L. R. 5 Q. B. 19.
(*s*) *Redgrave* v. *Lee* (1874), L. R. 9 Q. B. 363.

(*e.*) EMPLOYERS AND WORKMEN ACT, 1875,—AND CONSPIRACY, ETC., ACT, 1875.

Master and Servant Act, 1867 (now repealed),—provisions of.

By the Master and Servant Act, 1867,—the provisions of which were in substitution for the provisions as to service contained in the various Acts of Parliament which are specified in the first schedule to the Act, and which include the 40 Geo. 3, c. 77, s. 3, regarding "colliers and miners,"—it was provided as follows, but only as regards contracts for service of the nature referred to in those enactments, that is to say :—By s. 4, that wherever the employor or the employed should refuse or neglect to fulfil any contract of service, or the employed should refuse or neglect to enter upon or commence his service, or should absent himself therefrom,—or where any dispute should arise between employer and employed touching any injury to the person or property of either,—the aggrieved party might complain in writing to a justice, setting forth the ground of the complaint and the amount of the damage or other redress which he desired ; and the justice was thereupon required to summon the offender to appear before two justices or a magistrate to answer the complaint ; and (by s. 9), upon the hearing of the complaint and proof thereof, the justices or magistrate might order compensation to be paid, or (as the case might require) might order an abatement of the wages, or a fulfilment (or, as the case might be, a cancellation) of the contract (*t*), or might impose a fine ; and in cases of aggravated misconduct, unless the same had been done under the *bonâ fide* assertion of a claim of right or supposed right, the offender then (by s. 14) might be ordered to be imprisoned for a period not exceeding three months, with or without hard labour ; and (by s. 17) no wages were to be payable during the period of imprisonment,—all these provisions being cumulative (s. 18). However, the Act has now been repealed ; and the repealed provisions (so far as they gave a civil remedy) have been replaced by the Employers and Workmen Act, 1875 (*u*), and (so far as they gave a criminal remedy) have been replaced by the Conspiracy and Protection of Property Act, 1875 (*x*) ; and the provisions of these two last-mentioned Acts are to the effect following, that is to say :—

(1) Employers and Workmen Act, 1875,—provisions of.

Firstly, the Employers and Workmen Act, 1875, provides, that where any dispute arises between an employer and his work-

(*t*) *Crane* v. *Powell* (1868), L. R. 4 C. P. 123 ; *Cutler* v. *Turner* (1874), L. R. 9 Q. B. 502 ; *Unwin* v. *Clark* (1866), L. R. 1 Q. B. 417.

(*u*) 38 & 39 Vict. c. 90.

(*x*) 38 & 39 Vict. c. 86.

man incidental to that relation, the county court, in addition to its other jurisdiction, shall have jurisdiction (by s. 3) to adjust and set off all claims of either against the other, and whether such claims are liquidated or unliquidated ; and also to rescind any contract upon equitable terms, or to order specific performance of the contract in lieu of awarding damages for the breach thereof. And (by s. 4) where the amount involved does not exceed 10*l*., the dispute may be dealt with by a court of summary jurisdiction,—which, for this purpose, is to be a civil court (*y*) ; and (by ss. 5 and 6) where the dispute is between a master and his apprentice, the last-mentioned court may either direct the apprentice to perform his duties under, or may rescind, the instrument of apprenticeship,—the court of summary jurisdiction referred to in the Act being any police or stipendiary magistrate, or justices of the peace having jurisdiction under the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43) (*z*) ; and the Act extends to colliers and miners.

(2) Conspiracy, etc., Act, 1875,—provisions of.

Secondly, the Conspiracy and Protection of Property Act, 1875, provides (by s. 3), that no agreement or combination by two or more persons to do (or procure to be done) any Act, in contemplation or furtherance of a trade dispute between masters and workmen, shall be indictable as a conspiracy, if such Act (where committed by one person) would not be a crime or punishable as such,—that provision leaving unaffected, of course, the law as to riots, unlawful assemblies, and the like. And the Act provides (by s. 4), that (in effect) the employees of gas and water companies who shall wilfully and maliciously break their contracts of service, knowing (or having reasonable cause to believe) that the effect of the breach will be to interrupt the supply of gas or water over the area of supply, shall be criminally answerable,—and liable to a penalty of 20*l*., or to imprisonment for three months with or without hard labour. Also, (by s. 5) any employees who shall wilfully and maliciously break their contracts of service, knowing (or having reasonable cause to believe) that the effect of the breach will be to endanger human life or to cause serious bodily injury or to expose valuable property (including real estate) to destruction or serious injury

(*y*) *Clemson* v. *Hubbard* (1876), 1 Ex. D. 179.

(*z*) The Summary Jurisdiction Act, 1848, has been since diversely amended,—the "Summary Jurisdiction Acts" now being,—the Act of 1848 (11 & 12 Vict. c. 43); the Act of 1879 (42 & 43 Vict. c. 49); the Act of 1881 (44 & 45 Vict. c. 24); the Act of 1884 (47 & 48 Vict. c. 43); and the Act of 1899 (62 & 63 Vict. c. 22).

are made criminally answerable, and are liable to the like punishment by penalty or imprisonment. The Act also enacts (by s. 7), that anyone who, with a view to compelling another to refrain from an act which he has a legal right to do (or to do an act which he has a legal right to refrain from doing), uses violence towards or intimidates him or his wife or children, or injures his property, or is guilty of molestation within the meaning of the Molestation Act, 1871, shall be liable to the like punishment.

(*f.*) CONCILIATION ACT, 1896.

Conciliation of differences, —provisions for.

This Act provides, that any conciliation board (being any board constituted for the purpose of settling disputes between employers and workmen, or any body authorised by agreement in writing between employers and workmen to deal with such disputes) may be registered as a conciliation board at the offices of the Board of Trade (s. 1), the conciliation board first sending to the Board of Trade a copy of its bye-laws and regulations, and otherwise satisfying the requisitions of that board ; and thereupon, and subject to any agreement to the contrary, all proceedings before the conciliation board touching any disputes are to be conducted in accordance with the regulations of the board (s. 1 (6)). Also (by s. 2), where any difference exists or is apprehended between an employer (or any class of employers) and workmen, or between different classes of workmen, the Board of Trade may, if they think fit, exercise all or any of the following powers, namely :—The board may inquire into the causes and circumstances of the difference ; or may take such steps as to the board may seem expedient, for the purpose of enabling the parties to the difference to meet together by themselves or their representatives (under the presidency of a chairman mutually agreed upon or nominated by the Board of Trade or by some other person or body) with a view to the amicable settlement of the difference. And on the application of the employers or workmen interested, and after taking into consideration the existence and adequacy of the means available for conciliation in the district or trade and the circumstances of the case, the board may appoint a person or persons to act as conciliator or as a board of conciliation. Or the board may, on the application of both parties to the difference, appoint an arbitrator.

And when any one is appointed by the board to act as conciliator, he is to proceed to inquire into the causes and circumstances of the dispute or difference, and is to endeavour to bring

about a settlement of the dispute or difference, reporting his proceedings to the board; and if a settlement is effected, a memorandum of the terms thereof is to be drawn up and signed by the parties or their representatives, and a copy thereof delivered to the board.

Also, generally, in any case where it appears to the Board of Trade that adequate means do not exist in any district or trade for having disputes submitted to a conciliation board, the board may direct an inquiry into the conditions of the district or trade, conferring for that purpose (and in that inquiry) with the employers and employed,—and (if the board think fit) with any local authority or body,—as to the expediency of establishing a conciliation board for the district or trade.*

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* It being impossible, consistently with the scope and principal objects of this treatise, to treat in a sufficient or exhaustive manner of the law relative to masters and workmen, the reader is referred to the following recent works on the subject, both of which are of a standard character, namely:—"Employer's Liability and Workmen's Compensation," by A. H. RUEGG, Q.C.; and WILLIS' "Workmen's Compensation Act."

CHAPTER XVI.

ON THE COAL TRADE; AND ON COAL-GETTING AND COAL-CARRYING CONTRACTS.

(i.) Coal Trade, Regulation of.

Boats, Waggons, etc., Measurement of.

The legislature has, from time to time, endeavoured to regulate the coal trade ; and by the earlier statutes (all now repealed) (*a*), all keels, boats, waggons, wains, carts, and carriages, used for the conveying of coals in any of the ports, were to be admeasured by commissioners appointed for the purpose,—and also re-admeasured as often as should be necessary (*b*). And by the 17 Geo. 2, c. 35, s. 1, any three justices of the peace of the several counties in England and Wales and Berwick-upon-Tweed, were empowered to set the prices of all coals brought by sea to all places (except the river Thames) and sold by retail, allowing a competent profit to the retailer ; and if any engrosser or retailer of such coals refused to sell at the prices so fixed, it was made competent for the justices to empower persons to enter into or upon any wharf or store-place, and to cause the coals thereon or therein to be sold at those prices. And as regards the counties of Northumberland and Durham, the measuring and sale of coals was further regulated, by a royal commission, dated August 30th, 1830, addressed to the chief coal-owners, viewers, and customs officers of the district, the commission containing divers specific directions,—regarding the registry of keels, boats, waggons, and carriages ; and regarding the measuring and marking of them, and generally for the prevention of frauds in the sale of coals.

Coal trade,—regulation of: (1) Generally;

(2) In Northumberland and Durham.

Coal, Sale Prices of.

By the 9 Anne, c. 28, combinations between persons engaged in the coal trade to keep up the price of coal were declared

Coal, sale of,—regulation of: (1) Generally;

(*a*) 30 Car. 2, st. 1, c. 8; 6 & 7 Will. 3, c. 10; 11 Geo. 2, c. 15; 15 Geo. 3, c. 27.

(*b*) 31 Geo. 3, c. 36, ss. 1, 4.

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illegal ; and by the 4 Geo. 2, c. 30, the owners or masters of vessels engaged in the coal trade, were forbidden to keep turn in the delivery of their coals in the river Thames ; and by the 28 Geo. 3, c. 53, further provisions were made against combinations among coal merchants. But latterly, all these provisions were repealed by the 6 & 7 Will. 4, c. 109 ; and about the same time, it was enacted, by the 5 & 6 Will. 4, c. 63, s. 9, that all coals, slack, culm, and cannel of every description should be sold by weight, and not by measure,—under a penalty upon the seller (recoverable by *qui tam* action) (*c*) of forty shillings for every sale by measure. And as regards London, in particular, by the 1 & 2 Will. 4, c. 76,—whereby the Coal Exchange was vested in the mayor, commonalty, and citizens of the city, and was made an open and public market for the sale of coals,—the court of the Lord Mayor and Aldermen were empowered to make byelaws for the management of the market ; and coal, cinders, and culm were required to be sold by weight, and not by measure (*d*). And as regards Ireland, the coal trade was regulated by the 2 & 3 Will. 4, c. 21.

(2) In London.

THE LONDON COAL DUES.

The London coal dues,—origin of ;

It appears, that the corporation of the city (which had from time immemorial exercised the office of bailiff or conservator of the river Thames) had also from time immemorial exercised the office of measurer of all coals brought into the Port of London by the river, and had received the profits of that office ; and these offices (together with the profits thereof) were confirmed to the corporation by the charter 3 Jac. 1, and again by the charter 12 Jac. 1,—by which last-mentioned charter a fee of eightpence per ton was allowed to the corporation. And afterwards, by the 5 & 6 Will. & Mary, c. 10, a further fee of fourpence per ton or per chaldron was allowed to the corporation in respect of all coals imported, and a further fee of sixpence per ton or per chaldron in respect of all coals sold : All which provisions were afterwards continued by the 10 Geo. 4, c. 136. And subsequently, by the 1 & 2 Will. 4, c. 76, intituled "An Act for regulating the vend and delivery of coals in the cities of London and Westminster, and in certain parts of

(*c*) *Parish* v. *Barwood* (1803), 5 Esp. 33 ; *Collins* v. *Hopwood* (1846), 15 M. & W. 463.

(*d*) 1 & 2 Will. 4, c. 76, ss. 43, 44 ; *Butterfield* v. *Windle* (1803), 4 East, 385 ; *Little* v. *Poole* (1829), 9 B. & C. 192 ; *Brown* v. *Duncan* (1829), 10 B. & C. 93 ; *Meredith* v. *Holman* (1847), 16 M. & W. 798.

the counties of Middlesex, Surrey, Kent, Sussex, Hertford, Bucks, and Berks," a uniform rate or duty was provided to be paid to the corporation in lieu of all rates and duties theretofore payable to them with respect to all coals, culm, and cinders,—that is to say, a rate or duty of twelve pence for every ton imported or brought into the Port of London (*e*) : Which last-mentioned rate or duty was successively continued by the 1 & 2 Vict. c. 101, and by the 8 & 9 Vict. c. 101, and by the 24 & 25 Vict. c. 42, and by the 26 & 27 Vict. c. 46, and by the 31 Vict. c. 17, —up to July 5th, 1889 : When, by the 52 & 53 Vict. c. 17, the duty was abolished, as from that day,—it being thereby enacted, that the city should not thereafter exercise any right of measuring or of weighing coals, or demand, collect, or receive any duties or dues on coal, etc., imported or brought into the Port of London, or brought within the limits of the Metropolitan Police District,—save that the duty of fourpence per ton under s. 2 of the 31 Vict. c. 17, was to be continued a year longer, for the purpose of (or towards discharging) the Holborn Valley Improvements Loan authorised by the last mentioned Act.

and abolition of.

WEIGHING OF COAL ON SALE.

By the 41 & 42 Vict. c. 49, whereby uniformity of weights and measures has been provided for, and penalties imposed for any breach or evasion of the provisions of the Act, the provisions of the 5 & 6 Will. 4, c. 63, s. 9,—whereby coal is required to be sold by weight and not by measure,—are re-enacted ; and now, by the Weights and Measures Act, 1889 (*f*), it has been provided (relative to the sale of coal), that all coal shall be sold by weight only (s. 20),—unless where it is sold direct from the colliery, and delivered with the written consent of the purchaser at his works in boat-loads or in waggons or tubs. And as regards coal required to be sold by weight,—Then, firstly, if the quantity delivered exceeds two hundredweight, a delivery ticket is to be left with it (s. 21),—the ticket stating separately the correct tare weight of the cart, and also the correct weight of the coal (s. 22) (*g*) ; and various penalties are imposed for any breach or evasion of these provisions of the Act ; and, secondly, as regards coal sold in quantities not exceeding two hundredweight, the true quantity is to be delivered

Weighing of all coal, on a sale,—necessity for :

(1) Sales over two hundredweight.

(2) Sales not over two hundredweight.

(*e*) *London* (*Corporation*) v. *Parkinson* (1850), 10 C. B. 228.

(*f*) 52 & 53 Vict. c. 21. And (as to the *description* of the seller, or coal-merchant) see *Cameron* v. *Tyler*, [1899] 2 Q. B. 94.

(*g*) *Knowles and Sons* v. *Sinclair*, [1898] 1 Q. B. 170.

(s. 24) (*h*) ; and if the sale is in a shop, there must be a weighing machine in the shop (s. 25),—penalties being imposed for any breach or evasion of these provisions also. And the Act contains also divers provisions for the maintenance of (and for the inspection of) weighing machines.

CIVIL REMEDIES AND PENALTIES.

The penalties imposed by the earlier Acts were for the most part cumulative,—that is to say, the right of action was not thereby affected. And accordingly, the seller could not maintain an action for the price of the coal sold, if he had not complied with the provisions of the Acts (*i*) ; and the purchaser might bring an action of debt, for any deficiency in the weight (*k*).

Where the action was brought to recover the penalty, a strict compliance with the provisions of the statute as to weighing the coal and sacks separately was a condition precedent to the plaintiff's right to recover (*l*) ; and the law in that respect still remains unaltered (*m*),—and for an obviously good reason.

(ii.) Coal-getting and coal-carrying contracts.

CONTRACTS, GENERALLY.

Contracts,—dependent and independent.

Where A. agrees to sell a colliery to B., and also to take all his coals from B.,—B. may not sue A. for not taking his coals from him, unless he (B.) is ready and willing to complete his purchase of the colliery (*n*),—*scil.*, because the two agreements are concurrent agreements, and the acts agreed to be done are concurrent acts. But the actual performance of either agreement is not, in such a case, a condition precedent to suing upon the other agreement as for a breach thereof ; and readiness and willingness to perform it is therefore all that the law requires (*o*).

Contracts, to endure for a fixed period

In *Rhodes* v. *Forwood* (*p*), where the plaintiff and the defendant mutually agreed, that for seven years the plaintiff should be the

(*h*) *Alty* v. *Farrell*, [1896] 1 Q. B. 636.

(*i*) *Cundell* v. *Dawson* (1847), 4 C. B. 376.

(*k*) *Collins* v. *Hopwood* (1846), 15 M. & W. 459 ; 16 L. J. (N.S.) Exch. 124 ; *Reeve* v. *Poole* (1825), 4 B. & C. 155 ; *Blanford* v. *Morrison* (1850), 15 Q. B. 724 ; 19 L. J. (N.S.) Q. B. 533.

(*l*) *Meredith* v. *Holman* (1847), 16 M. & W. 798.

(*m*) *Smith* v. *Wood* (1889), 24 Q. B. D. 23.

(*n*) *Bankard* v. *Bowers* (1866), L. R. 1 C. P. 484.

(*o*) *Pordage* v. *Cole* (1669), 1 Wms. Saund. 319 ; *Peeters* v. *Opie* (1672), 2 Wms. Saund. 352.

(*p*) (1876), 1 App. Cas. 256.

sole agent at L. for the sale of defendant's coals, and that the defendant would not during the seven years employ any other agent at L. for that purpose ; and at the end of four years, the defendant sold the colliery, whereby the plaintiff's sole agency was determined,—the court held, that the agreement did not bind the defendant to keep his colliery unsold,—or in fact to do more than employ the plaintiff as his sole agent at L. for the sale of such coals as he should send to L.,—the court observing :—That where two parties mutually agree for a fixed period, the one to employ the other as his sole agent in a certain business at a certain place, the other that he will act for no other principal at that place, there is no implied condition that the business itself should be continued during the period.

of years,—*semble*, no warranty of continuance.

CONTRACT, BREACH OF.

In *Fothergill* v. *Rowland* (*q*), where the plaintiffs (iron masters) had agreed to pay the defendant 1,000*l.* to be applied by him in the development of a colliery, and he had agreed to sell to the plaintiffs at a fixed price all the coal to be gotten from the colliery during five years ; and the plaintiffs, paid the 1,000*l.*, and the defendant applied it in developing the colliery ; and the price of coal doubled during the five years,—so that the defendant was a loser by his contract with the plaintiffs ; and he (during the five years) contracted to sell the colliery to others, and in the meantime was selling the coals to the public generally,—and the plaintiffs sought to restrain him from so doing to their prejudice ; and it appeared, that the coal was of the ordinary description, and not coal of a peculiar character,—The court held, that the plaintiffs' remedy was in damages only, as in the case of the sale of an ordinary chattel,—the agreement containing no negative clause binding the defendant not to sell the coals to anyone else.

Remedy for breach,—is in damages, usually.

BREACH OF CONTRACT, DAMAGES FOR, MEASURE OF.

For the breach of a contract to deliver coals by periodical deliveries, the measure of the damages will, in general, be the aggregate amount of the differences between the contract price per ton and the selling prices per ton at each period appointed for the delivery of the coals (*r*) ; but, under exceptional circumstances, the amount of the damages may be required to be

Damages,—measure of : (1) Generally;

(*q*) (1873), L. R. 17 Eq. 132.
(*r*) *In re Voss* (1873), L. R. 16 Eq. 155 ; *Roper* v. *Johnson* (1873), L. R. 8 C. P. 167.

differently ascertained (*s*),—as, *e.g.*, where the defendant has definitely refused to deliver or has repudiated his liability to deliver (*t*) ; or where the coal itself is of such a peculiar quality that it deteriorates if not delivered as soon as it is gotten (*u*).

(2) For breach of warranty.

Upon the sale of coal, with a warranty that it is fit for a specific use (as, *e.g.*, for steam vessels, or for furnace purposes), the damages recoverable for a breach of the warranty appear to admit of no certain measure (*x*).

Warranty and misrepresentation,—distinguished.

A warranty must be a term of the contract,—that is to say, part and parcel of the contract itself ; and it is, in this respect, different from a false or fraudulent representation made before the contract and which induced the plaintiff to enter into the contract ; and the remedy for such a representation (not being a warranty) is either to return the goods sold (recovering back the contract price if paid), or else to recover damages for the difference of quality (retaining in the latter case the goods sold).

TRAFFIC FACILITIES, AND UNDUE PREFERENCES,—IN CARRIAGE.

"Facilities."

By the 17 & 18 Vict. c. 31, s. 2,—extended (or, in effect, extended) by the 31 & 32 Vict. c. 119, s. 16, to any steam-vessel-continuation of a railway route ; and amended and explained by the 51 & 52 Vict. c. 25, s. 25,—a railway company, or canal company, or a railway and canal company, was required to afford all "*reasonable facilities*,"—for the receiving and forwarding and delivery of traffic upon and from the several railways and canals belonging to or worked by the company ; and for the return of carriages, trucks, boats, and other vehicles,—without making or giving any "*undue or unreasonable preference or advantage*" to or in favour of any particular person or company or any particular description of traffic ; and without subjecting any particular person or company, or any particular description of traffic, to any "*undue or unreasonable prejudice or disadvantage.*" And every railway company, canal company, and railway and canal company, having or working railways or canals forming part of a continuous line of railway or canal, or railway and canal communication, or whose terminus, station,

"Undue references."

(*s*) *Ogle* v. *Earl Vane* (1868), L. R. 3 Q. B. 272.

(*t*) *Tyers* v. *Rosedale and Ferryhill Co.* (1875), L. R. 10 Exch. 195.

(*u*) *Silkstone Coal Co.* v. *Joint Stock Coal Co.* (1876), 35 L. T. 668.

(*x*) *Pacific S. N. Co.* v. *Lewis* (1847), 16 M. & W. 783 ; 16 L. J. (N.S.) Exch. 212.

or wharf was near the terminus, station, or wharf of any other such company, was required to afford all "*due and reasonable facilities*,"—for receiving and forwarding all the traffic arriving by one of such railways or canals by the other, without any "*unreasonable delay*," and without any such preference or advantage, or prejudice or disadvantage, as aforesaid,—and so that no obstruction should be offered to the public desirous of using such railways, canals, or railways and canals, as a continuous line of communication; and so that all reasonable accommodation should, by means of the railways and canals of the several companies, be at all times afforded to the public.

Through traffic,—facilities for.

By the Regulation of Railways Act, 1873, s. 11, the "*facilities*" referred to in the 17 & 18 Vict. c. 31, were extended to include the due and reasonable receiving, forwarding, and delivering by every railway company, canal company, and railway and canal company, at the request of any other such company, of *through traffic* to and from the railway or canal of any other such company, at through rates, tolls, or fares (*y*).

The Commissioners.

The enforcement of these provisions was originally entrusted to the superior courts of common law,—but that jurisdiction was afterwards, by the Regulation of Railways Act, 1873 (*z*), transferred to the Railway Commissioners appointed by that Act; and under the Railway and Canal Traffic Act, 1888 (*a*), the jurisdiction is now entrusted to the Railway and Canal Commission appointed by that Act.

Jurisdiction,—not exclusive.

The constitution of the Railway Commissioners as a special tribunal was held not to have deprived the superior courts of their jurisdiction in the same matters (*b*); and the jurisdiction of the Railway and Canal Commission is of the like non-exclusive character (*c*); moreover, a prohibition to the commissioners (or commission) will, in a proper case, issue, where the special jurisdiction is being exceeded (*d*).

(*y*) *Great Western Rail. Co.* v. *Railway Commissioners* (1881), 7 Q. B. D. 182; *Great Western Rail. Co.* v. *Central Wales Rail. Co.* (1882), 10 Q. B. D. 231; *Taff Vale Rail. Co.* v. *Davis*, [1895] A. C. 542.

(*z*) 36 & 37 Vict. c. 48.

(*a*) 51 & 52 Vict. c. 25.

(*b*) *Budd* v. *London and North Western Rail. Co.* (1877), 25 W. R. 752.

(*c*) *Barry Rail. Co.* v. *Taff Vale Rail. Co.*, [1895] 1 Ch. 128.

(*d*) *Toomer* v. *London, Chatham and Dover Rail. Co. and South Eastern Rail. Co.* (1877), 26 W. R. 31; *Warwick Canal Co.* v. *Birmingham Canal Co.* (1879), 5 Ex. D. 1; *Great Western Rail. Co.* v. *Waterford, etc. Rail. Co.* (1881), 17 Ch. D. 493.

THE RAILWAY AND CANAL COMMISSION,—JURISDICTION OF.

Jurisdiction, —increase of.

By the 51 & 52 Vict. c. 25, further jurisdiction has been conferred on the commissioners ; and they are thereby enabled (by s. 9),—to hear and determine all complaints of the alleged contravention of the provisions contained in any statute relative to traffic facilities, undue preferences, and the like ; or regarding the duty to provide station accommodation (*e*), and the like ; and also (by s. 10), to hear and determine disputes as to the legality of tolls, rates, and charges for goods traffic. And (by s. 12), they are empowered to award damages (including the repayment of alleged over-charges), either in addition to, or in substitution for, other relief ; and (by s. 14) they may require two or more companies to concur (when their concurrence is necessary) in carrying out any order of the commissioners,—being an order which the commissioners could lawfully make against either of the companies (*f*). Also, under s. 29,—being the section under which a railway company is enabled to group together any (reasonable) number of places as a district, and to charge "*group rates*" for the carriage of goods traffic to or from any of such places,—the commissioners are authorised to determine as to the legality of the group rate, and in particular whether it is (or amounts to) an undue preference.

The decision of the commissioners upon all matters submitted to them is final and without appeal,—save when some question of law is involved ; in which latter case, an appeal is allowed,—the decision of the Court of Appeal being final and without further appeal (s. 17).

Damages,—items of, recoverable before the commissioners.

In *Lancashire and Yorkshire Rail. Co.* v. *Gidlow* (*g*), a colliery owner, who had suffered in his business through an unreasonable requirement of the railway company as to the quantity of his coal to be conveyed at any one time by the railway company,—and which requirement was not insisted upon in the case of other colliery owners,—recovered damages against the company ; and the damages included certain overcharges paid under protest, and also the damages sustained through the loss of customers,—and that, although overcharges may not, in

(*e*) *Hall* v. *London, Brighton and South Coast Rail. Co.* (1885), 15 Q. B. D. 505.

(*f*) *Toomer* v. *London, Chatham and Dover Rail. Co.* (1877), 2 Ex. D. 450.

(*g*) (1875), L. R. 7 H. L. 517.

general, be set off against a claim by the company to recover its legal charges (*h*).

Jurisdiction, —further increase of.

By the 57 & 58 Vict. c. 54, the jurisdiction of the commission has been extended (by s. 1) to any *increase* of railway rates or charges made or to be made since December 31st, 1892, where the increase is complained of as being unreasonable (*i*) ; and (by s. 4) to any *rebate* of the railway rates or charges which the complainant claims to be entitled to, by reason of the company not providing station accommodation, or otherwise performing terminal services (*k*).

PREFERENCES, LEGITIMATE.

Preferences, —which are legitimate ; or which are not so.

In the judicial application and interpretation of the Railway and Canal Commission Acts, consideration has been given to the fair interests of the railway or canal itself ; but the court (or the commissioners) would in no case sanction any preference which simply consisted in giving an advantage to one competitor over another, and which was not founded on any such consideration of benefit to the company (*l*). Thus, a preference might be given in cases where the cost of carriage was less to the company in one case than in another ; but when the pecuniary interests of the company were not shown to be affected, such a preference would not be allowed (*m*). And even the threat of a coal owner, that, unless he was allowed to have his coals carried at a certain rate, he would construct a railway, which should divert his coal altogether from that of the company, was held not to justify a preference (*n*) ; nor even the promise of a customer, that he would use other distinct lines of the company (*o*),—unless where, *semble*, such an amount of traffic was secured by the arrangement as compensated for the reduction (*p*) ; but a guarantee of large quantities, and full

(*h*) *Lancashire and Yorkshire Rail. Co.* v. *Greenwood* (1888), 21 Q. B. D. 215 ; *Rhymney Rail. Co.* v. *Rhymney Iron Co.* (1890), 25 Q. B. D. 146.

(*i*) *Mansion House Association* v. *Great Western Rail. Co.*, [1895] 2 Q. B. 141.

(*k*) *West* v. *London and North Western Rail. Co.* (1870), L. R. 5 C. P. 622 ; *Hall* v. *London, Brighton and South Coast Rail. Co.* (1885), 15 Q. B. D. 505.

(*l*) *Ransome* v. *The Eastern Counties Rail. Co.* (1857), 1 C. B. (N.S.) 437 ; 26 L. J. C. P. 91 ; *Oxlade* v. *The North Eastern Rail. Co.* (1857), 1 C. B. (N.S.) 454 ; 26 L. J. C. P. 129.

(*m*) *Oxlade* v. *The North Eastern Rail. Co. supra.*

(*n*) *Harris* v. *The Cockermouth and Workington Rail. Co.* (1858), 3 C. B. (N.S.) 693 ; 27 L. J. C. P. 129.

(*o*) *Baxendale* v. *The Great Western Rail. Co.* (1858), 5 C. B. (N.S.) 309 ; 28 L. J. C. P. 69. See also 5 C. B. 336 ; 28 L. J. C. P. 81.

(*p*) *Garton* v. *The Great Western Rail. Co.* (1859), 5 C. B. (N.S.) 669 ; 28 L. J. C. P. 158.

train loads, at regular periods, formed a good consideration for a preference over those who could not give such a guarantee,—*scil.*, if the real object of the company was to secure a greater amount of profit by the diminished cost of carriage (*q*).

Preferences, —of defined districts.

The adjustment of certain districts to become entitled to reduced rates,—the effect of which was to give one dealer an advantage over another by reason of a larger extent of custom,—was not prohibited by the Acts ; but when the effect was to diminish the natural advantages of the dealers at certain places by reason of proximity, and to abolish part of the cost of carriage to the same places in favour of other dealers, an undue preference was held to be given (*r*). However, where a reduced rate was established for the carriage of coals in certain quantities to certain districts, the company were held entitled to carry the coals most conveniently for themselves, and with due regard to their working expenses, without any imputation of preference of one district over another—if the tariff was not infringed (*s*).

DUTY OF COMPANY, LIMIT TO.

Duty of company,— generally.

And, generally, a railway company cannot, under any alleged duty to provide railway "*facilities*," be compelled to maintain a station at a loss, or to conduct their business at a loss (*t*).

(*q*) *Nicholson* v. *The Great Western Rail. Co.* (1858), 5 C. B. (N.S.) 366 ; 28 L. J. C. P. 89 ; *Strick* v. *The Swansea Canal Co.* (1864), 33 L. J. C. P. 240.

(*r*) *Ransome* v. *The Eastern Counties Rail. Co.* (1857), 4 C. B. (N.S.) 135, 159 ; 27 L. J. C. P. 166.

(*s*) *Ransome* v. *The Eastern Counties Rail. Co. supra.*

(*t*) *Darlaston Local Board* v. *London and North Western Rail. Co.*, [1894] 2 Q. B. 694.

CHAPTER XVII.

ON CRIMINAL OFFENCES RELATING TO MINES,—AND ON THE MINES REGULATION ACTS, 1872, 1887 (WITH THE AMENDING ACTS).

(i.) On criminal offences.

Stealing Ore, etc.

(1) Stealing ore, etc.

As regards the offence of stealing ore or other mineral, the 24 & 25 Vict. c. 96, s. 38, enacts, that whosoever shall steal, or sever with intent to steal, the ore of any metal, or any lapis calaminaris, manganese, or mundick, or any wad, black cawke, or black lead, or any coal or cannel coal, from any mine, bed, or vein thereof, shall be guilty of felony; and, being convicted thereof, shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour.

Offence,—when deemed to have been committed.

And, of course, the stealing or larceny must have been proved by the like evidence as in the case of any ordinary larceny,—that is to say, by evidence of the felonious taking and carrying away of the personal property of another, without the consent of the true owner, and with the intention of converting it to the offender's own use (*a*); and accordingly, in a case of *R.* v. *Webb* (*b*), it was held not to be larceny, for miners employed to bring ore to the surface, and paid by the owners according to the quantity produced, to remove from the heaps of other miners ore produced by them and add it to their own, in order to increase their wages, the ore still remaining in the possession of the owner. However, now, by the 24 & 25 Vict. c. 96, s. 39, it is provided, that whosoever, being employed in or about any mine, shall take, remove, or conceal any ore of any metal, or any lapis calaminaris, manganese, mundick, or other mineral, found or being in such mine, with intent to defraud any proprietor of or any adventurer in such mine, or any workman or miner employed therein, shall be guilty of felony; and,

(*a*) Arch. Cr. Pl. p. 314.

(*b*) (1835), 1 Moo. C. C. 431.

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being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour.

ARSON OF MINES.

(2) Arson of mines;

As regards the *arson* of mines, the 24 & 25 Vict. c. 97, s. 26, enacts, that whosoever shall unlawfully and maliciously set fire to any mine of coal, cannel coal, anthracite, or other mineral fuel, shall be guilty of felony; and, being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years (now five years) (*c*), or to be imprisoned for any term not exeeeding two years, with or without hard labour, and with or without solitary confinement,—and, if a male under the age of sixteen years, with or without whipping. And by s. 27, it

and attempts at arson.

is provided, that whosoever shall unlawfully and maliciously, by any overt act, attempt to set fire to any mine, under such circumstances that (if the mine were thereby set fire to) the offender would be guilty of felony, shall be guilty of felony; and, being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not less than three years and not exeeeding fourteen years) (*c*), or to be imprisoned for any term not exceeding two years, with or without hard labour,—and, if a male under the age of sixteen years, with or without whipping. And upon these provisions, it has been held to be equally an offence, to set fire to a mine in the possession of the party himself, when it is proved to be done with the intention to defraud or injure any other person (*d*).

RIOTOUS OFFENCES.

(3) Riots, etc., in and about mines;

And as regards riotous offences in mines, the statute 24 & 25 Vict. c. 97, s. 11, enacts that, if any persons (riotously and tumultuously assembled together to the disturbance of the public peace) shall unlawfully and with force demolish, or pull down or destroy, or begin to demolish, pull down, or destroy (among other things) any machinery, whether fixed or moveable, prepared for or employed in any manufacture, or in any branch thereof, or any steam engine or other engine for sinking, working, ventilating, or draining any mine, or any staith,

(*c*) 27 & 28 Vict. c. 47, s. 2, as amended by the 54 & 55 Vict. c. 69, s. 1.

(*d*) See Arch. Cr. Pl. p. 505, 511.

building, or erection used in conducting the business of any mine, or any bridge, waggon-way, or trunk for conveying minerals from any mine, every such offender shall be guilty of felony; and, being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years (*e*), or to be imprisoned for any term not exceeding two years, with or without hard labour. And (by s. 12) it is provided, that, if any persons (riotously and tumultuously assembled together to the disturbance of the public peace) shall unlawfully and with force injure or damage (among other things) any such erection, machinery, engine, staith, bridge, waggon-way, or trunk, every such offender shall be guilty of a misdemeanor; and, being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years (now five years), or to be imprisoned for any term not exceeding two years, with or without hard labour; and that if, upon the trial of any person for any felony under s. 11, the jury shall not be satisfied that such person is guilty thereof, but shall be satisfied that he is guilty of any offence within s. 12, the jury may find him guilty of the latter offence, and he may be punished accordingly.

and riotous damage.

Offence,—when deemed to have been committed, and when not.

And here it is to be observed, that upon any prosecution under s. 11 the jury must be satisfied that the ultimate object of the rioters was to demolish the house, and that, if they had carried their intention into effect, they would in point of fact have demolished it,—for if the rioters merely do an injury to the house, and then (of their own accord) go away, as having completed their purpose, that is not a beginning to demolish within the statute (*ee*). However, a *total* demolition is not necessary to satisfy the statute; and the fact of the rioters having left a chimney remaining, will not prevent the offence from being complete(*f*).

Bonâ fide claim of right—effect of.

If the demolition be in the *bonâ fide* assertion of a supposed, though unfounded, claim of right, it is not within the statute,—though it be accompanied by a riot (*g*).

And if the demolishing, etc., be not proved so as to constitute the offence of felony, but the house be damaged or injured, and

(*e*) 27 & 28 Vict. c. 47, s. 2, as amended by the 54 & 55 Vict. c. 69, s. 1.

(*ee*) *R.* v. *Thomas* (1830), 4 C. & P. 239; *R.* v. *Price* (1833), 5 C. & P. 510; *R.* v. *Howell* (1839), 9 C. & P. 437; *R.* v. *Adams* (1842), C. & Mar. 299.

(*f*) *R.* v. *Phillips* (1842), 2 Moo. C. C. 252; *R.* v. *Batt* (1834), 6 C. & P. 329.

(*g*) *R.* v. *Phillips*, *supra*.

the other requisites of the section are satisfied, the offenders may be convicted of the misdemeanor under s. 12.

MALICIOUS INJURIES,—BY WATER.

(4) Malicious injuries,—by drowning mine, and the like.

As regards the drowning of mines, the 24 & 25 Vict. c. 97, s. 28, enacts, that, whosoever shall unlawfully and maliciously cause any water to be conveyed or run into any mine, or into any subterraneous passage communicating therewith, with intent thereby to destroy or damage such mine, or to hinder or delay the working thereof,—or shall, with the like intent, unlawfully and maliciously pull down, fill up, or obstruct, or damage with intent to destroy, obstruct, or render useless, any air-way, water-way, drain, pit, level, or shaft ot or belonging to any mine, —shall be guilty of felony; and, being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years, and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour,—and, if a male under the age of sixteen years, with or without whipping.

Offence,—when and when not committed.

But, of course, the provision does not extend to damage committed underground by the owner of an adjoining mine in working the same, or by any person duly employed in such working. And if workmen stop up an air-way by order of their master in a portion of the mine, it is not felony in the workmen, even though the master knew that he had no right to the air-way; but if the workmen knew, that the stopping of the air-way was a malicious act on the part of the master, then it is felony in the workmen (*h*).

The property of the mine may be laid in the person who is in possession working it (*i*).

MALICIOUS INJURIES,—GENERALLY.

(5) Malicious injuries, generally,—

As regards the offence of destroying engines, etc., the 24 & 25 Vict. c. 97, s. 29, enacts that, whosoever shall unlawfully and maliciously pull down and destroy, or damage with intent to destroy or render useless, any steam engine or other engine for sinking, draining, ventilating, or working any mine, or any appliance or apparatus in connection with any such steam or

(*h*) *R.* v. *James* (1837), 8 C. & P. 131.

(*i*) *R.* v. *John Jones* (1843), 7 Moo. C. C. 293; 1 C. & K. 181.

other engine,—or any staith, building or *erection* used in conducting the business of any mine, or any bridge, waggon-way, or trunk for conveying minerals from any mine, whether such engine, staith, building, erection, bridge, waggon-way, or trunk be completed or in an unfinished state ; or shall unlawfully and maliciously stop, obstruct, or hinder the working of any such steam or other engine, or of any such appliance or apparatus as aforesaid, with intent thereby to destroy or damage any mine, or to hinder, obstruct, or delay the working thereof ; or shall unlawfully and maliciously wholly or partially cut through, sever, break, or unfasten, or damage with intent to destroy or render useless, any rope, chain, or tackle, of whatsoever material the same shall be made, used in any mine, or in or upon any inclined plane, railway or other way, or other work whatsoever, in anywise belonging or appertaining to or connected with or employed in any mine or the working or business thereof,—shall be guilty of felony ; and, being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour,—and, if a male under the age of sixteen years, with or without whipping.

to steam-engines, and to *erections* generally; to waggon-ways, etc.

A scaffold erected at some distance above the bottom of a mine, for the purpose of working a vein of coal on a level with the scaffold, has been held to be an *erection* used in conducting the business of the mine, within the meaning of the section (*k*). And where an aqueduct, or wooden trough, was used for conveying water to a pond, half a mile from the mine ; and the water was used for washing the ores of the mine, and the slag-ore from old refuse heaps,—the aqueduct was held to be within the section, as an erection used in *conducting the business* of the mine (*l*).

"Erection" within the Act,—what is.

Where a mine is worked by a steam-engine, which causes a drum to revolve, and to take up the rope as the coal is drawn from the mine, damaging the drum would, *semble*, support an indictment for damaging the steam-engine, the words of the section including "any appliance or apparatus in connection with any such steam or other engine." And where the offender plugs up the feed-pipe of a steam-engine, and displaces other parts of the engine, in such a way as to render it temporarily useless, and liable to cause an explosion, that is a damaging of the engine

Steam-engine, damage to,—what is.

(*k*) *R.* v. *Whittingham* (1840), 9 C. & P. 234.

(*l*) *Barwell* v. *Winterstoke* (1850), 19 L. J. (N.S.) Q. B. 206.

within the meaning of the section (*m*). And where a steam-engine used in working a mine had been stopped and locked up for the night; and the defendant got into the engine-house and set it going; and, there being no machinery attached, the engine went with great velocity, and was damaged,—that was held to be a damaging of the engine, within the section (*n*).

OFFENCES GENERALLY,—UNDER THE MINES REGULATION ACTS.

(6) Offences, generally,—under the Mines Regulation Acts;

Offences under the Mines Regulation Acts are criminal offences, and punishable under those Acts; and, in addition, proceedings may be taken, in most cases, at the common law as well. Thus, where the ground bailiff, charged with the duty of seeing to the ventilation of a coal mine, was indicted for manslaughter through an explosion of gas which killed nineteen men, the explosion being occasioned by his negligence,—MAULE, J., directed the jury, that if it was the plain duty of the prisoner to direct the air-headings to be made, and he omitted ordinary precautions, he was guilty, whether other persons also had been guilty of the omission or not (*o*).

and examples thereof.

Also, a bankman, whose duty it was to place a stage on the mouth of a shaft, to receive a loaded truck from a tramway, and who neglected to place the stage, whereby the truck fell down the shaft and killed a workman, was held guilty of manslaughter (*p*). So also, a person whose duty it was to attend to the steam-engine by which the miners were drawn up the shaft, and who left it to the care of an incompetent person, who drew up the basket too far, whereby one of the miners in it was thrown down the shaft and killed, was held guilty (*q*).

CRIMINAL NEGLIGENCE, GENERALLY.

(7) Criminal negligence, generally.

And negligence in blasting stone in a quarry, whereby large pieces of stone are projected, so as to endanger the safety of persons lawfully using the adjoining highways, is a misdemeanor, and (as such) is indictable at common law (*r*).

(*m*) *R.* v. *Fisher* (1865), L. R. 1 C. C. R. 7.
(*n*) (1840), *R.* v. *Norris*, *ibid.* 241.
(*o*) *R.* v. *Haines* (1847), 2 Car. & K. 368.
(*p*) *R.* v. *Hughes* (1857), 26 L. J. M. C. 202.
(*q*) *R.* v. *Lowe* (1850), 4 Cox, 451.
(*r*) *R.* v. *Mutters* (1864), 10 Cox, C. C. 6.

(ii.) The Mines Regulation Acts, 1872, 1887.

Acts for regulation of mines,—enumeration of.

Various Acts having been from time to time passed for the inspection and otherwise for the regulation of mines,—all these Acts were repealed in 1872, and two new and more comprehensive Acts were substituted for them,—namely, the Coal Mines Regulation Act, 1872 (*s*), and the Metalliferous Mines Regulation Act, 1872 (*t*). However, the Coal Mines Regulation Act, 1872, has been repealed; and coal mines (and other the mines to which that Act applied) are now regulated by the provisions contained in the Coal Mines Regulation Act, 1887 (*u*), as amended by the 57 & 58 Vict. c. 52 (regarding check-weighers), and by the 59 & 60 Vict. c. 43 (regarding explosives and explosions); and the Metalliferous Mines Regulation Act, 1872, has been amended by the 38 & 39 Vict. c. 39 (regarding returns).

It is proposed to state briefly the effect of the Acts, dealing first with Coal Mines and nextly with the mines that are regulated by the Metalliferous Mines Acts.

(*a.*) COAL MINES, STRATIFIED IRONSTONE, ETC.

Coal mines, etc.,—regulation of, since January 1st, 1888.

Firstly.—The Coal Mines Regulation Act, 1887, which came into operation (s. 2) on January 1st, 1888, and which applies to the following classes of mines, that is to say:—(1) Mines of coal; (2) Mines of stratified ironstone; (3) Mines of shale; and (4) Mines of fire-clay (s. 3),—enacts as follows:—

ACT, 1887,—SPECIFIC PROVISIONS OF.

Act, 1887,—provisions of: (1) as regards boys, girls, and women, employed in mine.

As regards the *employment* of *boys*, *girls*, and *women*,—boys being defined as males under the age of sixteen years, girls being defined as females under that age, and women being all other females (s. 75),—the Act provides,—(1) That a register of all boys, girls, and women employed in or about the mine shall be kept (s. 8); and (2) That no boy under the age of twelve years, or any girl or woman, shall be employed underground (s. 4); and that no boy (*scil.*, of the age of twelve years or upwards) shall be employed underground for more than fifty-four hours per week, nor for more than ten hours per day (s. 5), —with certain prescribed intervals (s. 6); and (3) That no boy under the age of twelve years or girl under that age shall be

(*s*) 35 & 36 Vict. c. 76.
(*t*) 35 & 36 Vict. c. 77.
(*u*) 50 & 51 Vict. c. 58.

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employed above ground,—boys and girls of twelve years and under thirteen years of age being permitted to be employed for a limited number of hours varying with the number of days in the week they are employed ; and no boy or girl of thirteen years or upwards or any woman is to be employed above ground for more than fifty-four hours per week, nor for more than ten hours per day (s. 7),—with certain prescribed intervals.

(2) As regards wages,—payment of, etc.

And as regards *wages*, the Act enacts, that these shall not be paid in or about any public-house or place of entertainment (s. 11),—which provision is a mere application of the like more general provision contained in the 46 & 47 Vict. c. 31 ; and that when the wages are proportioned to the minerals gotten, the amount is to be estimated by weight,—certain deductions being made in respect of stone and the like brought up with the coal gotten (s. 12) (*x*), the work-people appointing one of themselves to be a check-weigher (s. 13) (*y*) ; and the weights used are to be those provided by the 41 & 42 Vict. c. 49, and are subject to the inspection of the inspector of weights and measures for the district (s. 15).

(3) As regards shafts or outlets.

And as regards *shafts*, the Act provides, that no mine shall be worked, unless every seam for the time being in work has two shafts or outlets in communication with it, with a breadth of natural strata between them of not less than fifteen yards, and with a communication between them not less than four feet wide and three feet (or now four feet) high,—and with proper apparatus, either in use or readily available for use, for the purpose of raising and lowering persons (s. 16). But the double shaft is not required in the case of workings for the purpose of searching for or proving minerals, or in the case of workings for the purpose of making a communication between two or more shafts,—in either case, so long as not more than twenty persons are employed below ground at any one time. Also, any proved mine may be exempted by order of a Secretary of State, on any sufficient ground,—as that the quantity of the mineral proved is not sufficient to repay the outlay of sinking or making a second shaft or outlet ; or on the ground, that the workings have reached the boundary of the mineral field, and only the pillars are being worked out,—in either case, so long as not more than twenty persons are employed below ground at any one time. An

(*x*) *Netherseal Coal Co.* v. *Bourne* (1888), 20 Q. B. D. 606 ; 14 App. Cas. 228 ; *Brace* v. *Abercarn Colliery Co.*, [1891] 2 Q. B. 699 ; *Kearney* v. *Whitehaven Colliery Co.*, [1893] 1 Q. B. 700.

(*y*) *Hopkinson* v. *Caunt* (1885), 14 Q. B. D. 592; *Whitehead* v. *Holdsworth* (1878), 4 Ex. D. 13.

order of exemption may also be obtained where one of the shafts is, by reason of some accident, unavailable for use,—the order being granted with certain safeguards (s. 18). And these provisions of the Act may not be evaded by any division of the mine into parts (s. 19).

(4) As regards the workings, generally.

And as regards the *workings* generally, the Act provides, that every mine shall have a certificated manager (*z*), controlling and daily supervising it; and the owner may appoint himself or any disinterested and competent person manager, notifying such appointment to the mine inspector of the district (ss. 20—22). And in case any certificated manager is represented to be incompetent, or grossly negligent, the Secretary of State may direct an inquiry into his conduct before the county court or before a magistrate; and the court or magistrate may, as the result of the inquiry, either cancel or suspend the manager's certificate (s. 27),—but the certificate may afterwards be renewed or restored, upon terms (s. 29).

(5) As to returns, plans, etc.

Also, on or before the 21st day of January in every year, the owner (or his agent) or the certificated manager is required to send to the inspector of mines for the district, and in the prescribed form, a correct *return* for the year ending December 31st, of the quantity of coal or other mineral wrought, and of the number of days the mines have been working in every month, and also of the number of persons ordinarily employed in or about the mine (distinguishing those below from those above ground, and specifying also their ages and classes) (s. 33); and he is required to also keep an accurate plan of the workings, and to produce it to the inspector (s. 34),—and the plan must (in addition to other things) show also the position of the workings by reference to the surface, and the direction of all known faults or dislocations (*a*).

(6) As regards accidents.

And with regard to *accidents* occurring in the mine, the Act provides, in s. 35,—That where, in or about the mine, and whether above or below ground, any loss of life or other personal injury to any person employed in or about the mine occurs, by reason of any explosion of gas, etc., or of any steam boiler,—or by reason of any accident whatever,—the owner, agent, or manager of the mine shall, within twenty-four hours next after the explosion or accident, send notice in writing of the explosion or accident, and of the loss of life or personal injury occasioned thereby, to the inspector, specifying the character of

(*z*) *Wynne* v. *Forrester* (1879), 5 C. P. D. 361.

(*a*) 59 & 60 Vict. c. 43, s. 3.

the explosion or accident, and the number of persons killed and injured respectively; and where the personal injury results in the death of the person injured, notice of the death is also to be sent to the inspector within twenty-four hours of the death.

(7) As regards the opening (or re-opening) of mines, —and as regards abandoned mines.

And with regard to the *opening*, the *abandonment*, and the *re-opening* of any shaft or mine, the Act provides,—That the owner, agent, or manager shall give notice thereof to the inspector within two months (s. 36); and where the mine is either abandoned or ceases to be worked, the owner is to cause the top of the shaft (and any side entrance from the surface) to be securely fenced, and to be so kept, for the prevention of accidents (s. 37). And where any mine is abandoned, the owner is required, within three months, to send to the Secretary of State an accurate plan,—on a scale of not less than that of the ordnance survey, or the plan in actual use at the mine,—showing the boundaries of the workings of the mine up to the time of the abandonment, the advance headings then made, and the pillars or other coal left unworked, the direction of all known faults or dislocations, the position of the workings by reference to the surface, the dip of the strata, and the depth of the shaft (*b*).

(8) As regards inspection, etc.

The Act contains, also, minute provisions regarding the inspection of mines, and for the settlement of disputes by arbitration (ss. 39—47) (*c*).

GENERAL RULES, —OBJECTS OF.

Section 49 of the Act also enacts certain *general rules* which are to be observed so far as is reasonably practicable (*d*),—these general rules relating to (1) the ventilation of the mine (*e*); (2) the general safety of the mine (*f*), including the fencing of the machinery, and of places not in actual use; and (3) the use of safety-lamps (*g*) and of explosives, etc., etc.

SPECIAL RULES,—OBJECTS OF.

Section 51 of the Act (as amended by the 59 & 60 Vict. c. 43, s. 1) also provides for certain *special rules*, which are to be established for the conduct and guidance of all persons connected with the mine, these special rules having for their object the

(*b*) 59 & 60 Vict. c. 43, s. 4.
(*c*) *The Secretary of State* v. *Fletcher* (1887), 18 Q. B. D. 339.
(*d*) *Baker* v. *Carter* (1878), 3 Ex D. 132; *R.* v. *The Spon Lane Colliery Co.* (1878), 3 Q. B. D. 673; *Wales* v. *Thomas* (1885), 16 Q. B. D. 340.
(*e*) *Brough* v. *Homfray* (1868), L. R. 3 Q. B. 771; *Wynne* v. *Forrester* (1879), 5 C. P. D. 361.
(*f*) *Higham* v. *Wright* (1877), 2 C. P. D. 397.
(*g*) *Dickenson* v. *Fletcher* (1873), L. R. 9 C. P. 1.

prevention of accidents in the mine (*h*), and the safety and general good behaviour of the persons employed (*i*).

PENALTIES.

And any contravention of the provisions of the Act is to be deemed an offence under the Act, and for which a penalty is imposed (ss. 59—70), recoverable against the actual or (occasionally) the constructive offender (*k*).

DEFINITIONS.

"Mine."—definition of.

And the Act defines a mine as extending to include every shaft in the course of being sunk, and every level and inclined plane in the course of being driven, and all the shafts, levels, planes, works, tramways, and sidings, both below ground and above ground, in and adjacent to and belonging to the mine,—a shaft being also expressly defined as including a pit.

(*b.*) METALLIFEROUS MINES.

Metalliferous mines,—regulation of, since January 1st, 1873.

Secondly.—The Metalliferous Mines Regulation Act, 1872, which came into operation on January 1st, 1873, and which applies to every mine,—other than a mine that is subject to the Coal Mines Regulation Act, 1887 (s. 3),—enacts as follows:

ACT, 1872,—SPECIFIC PROVISIONS OF.

Act, 1872,—provisions of:

(1) As regards women, young persons, and children, employed in mine.

As regards the *employment of women, young persons, and children*, the Act provides,—(1) That a register of them shall be kept (s. 6); and (2) That no boy under the age of twelve years, or any girl or woman, shall be employed below ground (s. 4), and that no boy between twelve and thirteen years of age, or other male under sixteen years, shall be employed below ground for more than fifty-four hours per week,—with certain prescribed intervals (s. 5); and (3) That no person under eighteen years of age shall have charge of any engine, windlass, or gin,—or of the machinery, ropes, chains, or tackle connected therewith,—in or about any shaft or inclined plane or level, for the purpose of taking persons up, down, or along the same; and the actual driver of the animal, where an animal is used, must not be a boy under twelve years of age,—and such boy acts, of course, under the person in charge (s. 7).

(*h*) *Baddeley* v. *Granville* (1887), 19 Q. B. D. 423.
(*i*) *Higham* v. *Wright, supra.*
(*k*) *Evans* v. *Small* (1885), 2 T. L. R. 139.

And as regards *wages*, the Act enacts, that these shall not be paid in or about any public-house or place of entertainment (s. 9).

(2) As regards wages.

(3) As regards returns.

And as regards *returns*, the Act (as amended by the 38 & 39 Vict. c. 39) enacts, that the owner or agent of the mine shall, on or before February 1st in every year, send to the district mine-inspector a correct return for the year ending December 31st of the quantity in statute weight of the mineral dressed, and of the undressed mineral which has been sold, treated, or used during that year, and the number of persons ordinarily employed in or about the mine, distinguishing those below and above ground, and their ages and classes (s. 10).

(4) As regards accidents.

And with regard to *accidents* occurring in the mine, the Act provides, in s. 11,—that where, in or about the mine and whether above or below ground, any loss of life or other personal injury to any person employed in or about the mine occurs, by reason of any explosion of gas, etc., or of any steam boiler,—or by reason of any accident whatever,—the owner or agent of the mine shall, within twenty-four hours next after the explosion or accident, send notice in writing of the explosion or accident and of the loss of life or personal injury occasioned thereby to the inspector, specifying the character of the explosion or accident, and the number of persons killed and injured respectively ; and where the personal injury results in the death of the person injured, notice of the death is also to be sent to the inspector within twenty-four hours of the death.

(5) As regards the opening (or re-opening) of mines, —and as regards abandoned mines.

And with regard to the *opening*, the *abandonment*, and the *re-opening* of any shaft or mine, the Act provides,—That the owner or agent of such mine shall give notice thereof to the inspector within two months (s. 12). And where the mine is abandoned, or ceases to be worked, the owner is to cause the top of the shaft (and any side-entrance from the surface) (*l*) to be securely fenced, and to be so kept, for the prevention of accidents (s. 13) ; and when any mine is abandoned, the owner is required, within three months, to send to the Secretary of State an accurate plan,—on a scale of two chains to the inch at the least,—showing the boundaries of the workings of such mine up to the time of abandonment (s. 14).

(6) As regards inspection, etc.

The Act contains also minute provisions regarding the *inspection* of mines, and for the settlement of disputes by arbitration (ss. 15—21).

(*l*) *Foster* v. *Owen* (1892), 9 T. L. R. 22; *Devonshire* v. *Stokes* (1897), 13 T. L. R. 376.

GENERAL RULES,—OBJECTS OF.

Section 23 of the Act also enacts certain *general rules* which are to be observed, so far as may be practicable,—these general rules relating to (1) the ventilation of the mine; (2) the general safety of the mine, and the fencing of machinery, and of shafts (*m*), and (3) the use of explosives (*n*).

SPECIAL RULES,—OBJECTS OF.

Section 24 of the Act also provides for certain *special rules* which are to be established for the conduct and guidance of all persons connected with the mine, these special rules having for their object the prevention of accidents in the mine, and the safety and general good behaviour of the persons employed.

PENALTIES.

Any contravention of the provisions of the Act is to be deemed an offence under the Act, and for which a penalty is imposed (ss. 31—38) (*o*).

DEFINITIONS.

"Mine,"—definition of.

And the Act defines a mine as extending to include every shaft in the course of being sunk, and every level and inclined plane in the course of being driven for commencing or opening any mine, or for searching for or proving minerals, and all the shafts, levels, planes, works, machinery, tramways and sidings, both below ground and above ground, in and adjacent to the mine, and any such shaft, level and inclined plane, and belonging to the mine,—a shaft being also expressly defined as including a pit.

"OWNER" OF MINE.

"Owner,"—meaning of.

In *Devonshire* (*Duke*) v. *Stokes* (*p*), there was an old unfenced abandoned lead-mine,—which was specially dangerous; and the question was as to the liability to fence it,—that liability resting, according to the words of the Act, on the "*owner*" of the mine or otherwise on the person "*interested in the minerals*" to be got therefrom: And the difficulty in determining who the "*owner*" was, arose from the mine being subject to the Derbyshire customs: But the court said, that (in effect) the fee

(*m*) *Evans* v. *Mostyn* (1877), 2 C. P. D. 547; *Foster* v. *North Hendre Co.*, [1891] 1 Q. B. 71.

(*n*) *Foster* v. *Diphwys Casson Co.* (1887), 18 Q. B. D. 428.

(*o*) *Foster* v. *Fyfe*, [1896] 2 Q. B. 104.

(*p*) (1897), 13 T. L. R. 376.

simple ownership, even where subject to the customs, was not divested,—*scil.*, because when the mine was abandoned, it reverted to the fee simple owner discharged from (or, for the time being, discharged from) the rights of mining under the customs.

MINES IN ISLE OF MAN.

The provisions of the Metalliferous Mines Acts, 1872 and 1875 have by the 54 & 55 Vict. c. 47, been made applicable to the like mines in the Isle of Man.

QUARRIES.

By the Quarries Act, 1894 (*q*), certain of the provisions (namely, the provisions referred to in the schedule to that Act) which are contained in the Metalliferous Mines Regulation Acts, 1872 and 1875, are made applicable (with the proper modifications) to quarries as defined by the Act,—that is to say, all places (not being mines) where slate or stone, coprolites, or other minerals are worked and gotten at a distance which (in any part of the workings) exceeds twenty feet from the surface ; and the provisions which are so made applicable are (roughly) the following, that is to say :—The provisions prohibiting the payment of wages at or near public-houses ; the provisions as to accidents resulting in loss of life ; the provisions as to inspections and as to arbitrations ; and the provisions for ensuring the safety and general good behaviour of the workers.

SLATE MINES, ORDER OF EXEMPTION.

Under the Slate Mines (Gunpowder) Act, 1882 (*r*), as regards any slate mine falling within the Metalliferous Mines Regulation Act, 1872, the owner may obtain from the Secretary of State an order of exemption with regard to the use of gunpowder or of other explosive in the mine,—the exemption being accompanied with certain safeguards, and being liable to revocation at any time.*

(*q*) 57 & 58 Vict. c. 42. (*r*) 45 & 46 Vict. c. 3.

* It has been deemed unnecessary (and it is, in fact, foreign to the scope and principal object of this Treatise) to give any exhaustive statement of the provisions of the Mines Regulation Acts, 1872 to 1896,—the Acts themselves being readily accessible, and an adherence to their exact provisions and even to their expressions being indispensable to any proceedings under them.

APPENDIX OF MINING PRECEDENTS.*

(A.) AGREEMENTS FOR LEASES,—AND CONDITIONS OF LETTING.

No. 1.—Agreement for a Lease of Mines [General Form].

MEMORANDUM of Agreement made the day of 19 BETWEEN [*lessor*] of the one part and [*lessee*] of the other part Whereby it is mutually agreed as follows that is to say:

The lessor hereby agrees with the lessee that he the lessor his heirs or assigns shall and will [with the consent and approbation of such parties as shall be necessary] on or before the day of now next ensuing or at any time afterwards upon the request in writing of the lessee grant and deliver unto the lessee or his assigns a good and valid demise or lease of ALL, etc. [*parcels, habendum, and reddendum*] AND the lessee hereby agrees with the lessor that he the lessee his executors administrators and assigns shall and will accept the said demise or lease when so granted as aforesaid and execute a counterpart thereof when required by the lessor his heirs or assigns and pay [one-half of] the costs and charges attending the preparation and execution as well of such lease and counterpart as of this present agreement and a duplicate hereof AND it is hereby agreed that there shall be contained in the said lease the following covenants provisoes and agreements on the part of the lessee that is to say, etc. [*Here insert the clauses applicable to the particular description of lease intended to be granted, including the clause of re-entry, or a concise and accurate summary of them, and including also a right in the lessor to purchase the machinery and mining implements generally, or any portion thereof, without purchasing the rest. But note, that if the lessor is the owner of a large mining district, and is in the habit of granting leases of the mines according to a regular system, it may be sufficient to refer to such regular system as follows, that is to say*: "The said lease shall contain all such other covenants clauses provisoes and agreements on the part of the lessee as are usually inserted in leases of a like nature now granted of the

Pp. 219 *et seq.*

Pp. 277 *et seq.*

* The pages specified in the margins of these precedents refer to the portions of the text which are illustrative of the precedents.

App. (A.) mines of the lessor within the district "] And it is hereby further agreed that there shall be contained in the said lease the proper covenants on the part of the lessor for title quiet enjoyment and further assurance Provided always and it is hereby declared that it shall be lawful for the lessee his executors administrators
Pp. 263, 264. and assigns upon payment and performance of the rent covenants and agreements on his and their part hereinbefore referred to to remove and take away within twelve months after the determination of the said term all the machinery implements of mining and other materials used for the purposes aforesaid and legally removable by a tenant unless the same shall have been purchased by the lessor his heirs or assigns Provided also and it is hereby further declared that until such lease shall be so granted as aforesaid the lessee his executors administrators and assigns shall enter upon work and occupy the said mine or vein and premises hereby agreed to be demised subject to the covenants reservations provisoes and agreements hereinbefore referred to as fully as if such lease had been actually executed and accepted but that in case the lessee his executors administrators or assigns shall not from time to time observe and perform such covenants reservations provisoes and agreements then it shall be lawful for the lessor his heirs and assigns to re-enter into and upon the said mine or vein and premises hereby agreed to be demised and the same to repossess and enjoy as in his and their former estate freed and discharged from this present agreement and all actions suits claims and demands whatsoever in respect thereof and all the estate or interest hereby agreed to be granted to the lessee his executors administrators or assigns shall in that case absolutely cease and determine both at law and in equity but without prejudice to any legal or equitable remedies which may have then accrued or which may then accrue to the lessor his heirs and assigns by reason of the non-observance or non-performance of any of the said covenants reservations provisoes and agreements. In witness, etc.

No. 2.—Agreement demising Right to search for Coal, with Option to take a Lease thereof [General Form].

Pp. 219 *et seq.* An Agreement made this day of 19 Between A. B. etc. and C. D. etc. of the one part and E. F. etc. and G. H. etc. (hereinafter referred to as "the said intended lessees") of the other part Whereby the said A. B. and C. D. in consideration of the rents reservations and agreements hereinafter reserved and contained and by or on the part of the said intended lessees to be paid and performed do and each of them doth

agree with the said intended lessees (and they with them) in manner following that is to say: App. (A.)

1. The said intended lessees shall have full and free liberty by themselves their agents servants and workmen at all times within the period of six years from the day of and without hindrance or molestation on the parts of the said A. B. and C. D. their heirs or assigns or any person claiming under them or either or any of them to bore dig and search for win work and carry away ALL mines beds bands or seams of coal belonging to the said A. B. and C. D. whether opened or unopened lying and being within under or throughout ALL those, etc. [*parcels*] AND for that purpose to dig sink drive and make pits shafts drifts headways levels places hedges and sluices and to make erect and lay down engines and machinery waggon-ways steaths banks sheds and storehouses and to do all other things necessary or convenient as well for working the said mines as for disposing of the produce thereof and for carrying off and removing all the water rubbish and other annoyances and troubles from the works and for the accommodation of the persons employed therein AND to take cart and carry away the said coal at their own will and pleasure with full and free liberty of access ingress egress regress and passage at all times during the said term for them the said intended lessees and their servants or workmen with or without horses and other animals and carriages and materials of all kinds as they shall think proper: Pp. 274, 360.

2. The said intended lessees shall pay unto the said A. B. and C. D. their heirs or assigns for the term aforesaid firstly the yearly dead or certain rent of £ per annum (they being at liberty to sink win and carry away in respect of the said rent an equivalent number of tons of coal the produce of the said beds bands or seams of coal reckoning each ton of coals the produce of the mines beds bands or seams of coal so wrought won and carried away at and after the rate of per ton of coals with power to make up any short workings which may happen or arise during the first years of the said term before the expiration of the said term but not afterwards) AND secondly the tonnage rent or sum of for every ton of coal which shall be so won wrought and carried away over and above the respective quantities which it shall be lawful to work for or in respect of the said dead rent such tonnage rent to be calculated on all coals conveyed away sold or disposed of and together with the aforesaid dead rent to be paid free from all rates and taxes (except landlord's property tax) by half-yearly payments on the day of and the day of in each year each ton to consist of twenty-one hundredweight of one hundred and twelve pounds avoirdupois: Pp. 286 *et seq.*

App. (A.)

Pp. 286, 315.

3. The said intended lessees shall and will make and pay reasonable satisfaction and compensation for all damage or injury which shall or may be done or occasioned in about or in consequence of the exercise of the mining or other powers by these presents made exercisable or any of them to the said A. B. and C. D. or other the persons body or bodies politic corporate or collegiate sustaining such damage or injury and shall and will indemnify and keep harmless the said A. B. and C. D. their heirs executors administrators and assigns against all claims to be made by third parties in respect of any such damage or injury:

Pp. 434—436.

4. The said intended lessees shall and will fence and protect all waggon-ways pits shafts drifts and other openings made or used by virtue hereof And also keep the mines properly drained and cleansed of water foul air or other annoyances arising or growing therein And shall not fill up any shaft drift level or cross-cut without the consent in writing of the said A. B. and C. D. or their viewer or agent nor do any wilful or negligent act matter or thing which may bring any creep or thrust upon the aircourses or watercourses but shall keep the levels and drifts open and the staples for air clear and in good condition and generally shall and will sink and manage the mines regularly and according to the rules of good mining and without unnecessary waste and under the control and to the satisfaction of the viewer or agent for the time being of the said A. B. and C. D. their heirs or assigns:

Pp. 289, 320.

5. The said intended lessees shall and will keep and have forthcoming at the office attached to the mines accounts and complete plans of the mines And also books of account of all coals wrought and led away distinguishing the several particulars necessary for the calculation of the rents payable by virtue of these presents And shall make and deliver gratis to the said A. B. and C. D. their heirs or assigns on the day of and the day of in each year of the said term or within seven days thereafter a correct copy signed by the viewer or agent of them the said intended lessees of the tonnage accounts of the said mines And shall permit the said A. B. and C. D. or their agent to examine and peruse and at their own expense to make copies of or extracts from the plans and books so to be kept and to take an account in writing of all coal which shall be worked out of the aforesaid premises:

6. All baskets tubs boxes and waggons used by the said intended lessees in bringing to bank and leading away the coals gotton from the said coal-mines shall be of uniform and certain and known size and gauge and shall not be altered without notice

to the said A. B. and C. D. their heirs or assigns or their agent of the intended alteration and which alteration shall only be made at the commencement of a half-year And the said A. B. and C. D. their heirs or assigns or their agents may measure and weigh all baskets tubs boxes and waggons so used and if they are found to contain more than the acknowledged and specified quantity may stop the excess which shall be accounted for in respect of one calendar month past or since the then last measuring or weighing as aforesaid:

7. The said intended lessees shall provide a proper weighing machine at each pit and permit the same to be used by the said A. B. and C. D. their heirs or assigns and their agents or servants for the weighing of the said coals And shall and will enable the said A. B. and C. D. their heirs or assigns or their agents and any persons employed by them or any of them to enter all buildings and to descend view and minutely examine and survey the mines at any time during the said term and again to ascend and shall cause two or more workmen who shall have a knowledge of the workings to assist in the survey:

8. The said intended lessees shall not nor will assign over or underlet to or permit the use of the said coal-mines and works or any of them by any other person or persons whomsoever without the license of the said A. B. and C. D. in writing first obtained: Pp. 277, 311, 330.

9. The said intended lessees shall leave the mines in good repair on the determination of the said term unless prevented by unavoidable creeps or accidents or unless the works shall have been abandoned with the consent in writing of the said A. B. and C. D. (save that the said intended lessees may remove all gins engines trains rolleys waggons baskets boxes tubs ropes and machinery iron plates rails and chains sleepers and rollers and all movable colliery stock or plant chattels and utensils subject nevertheless to the right of the said A. B. and C. D. their heirs or assigns of purchasing the same at a valuation as hereinafter mentioned) and shall and will within six calendar months after the determination of the said term effectually restore the surface of the said lands and all buildings thereon now or hereafter to be erected which shall have been damaged in the exercise of the powers aforesaid: Pp. 264, 305, 315.

10. The said A. B. and C. D. their heirs or assigns shall have the option of purchasing the plant at a valuation the amount in case of dispute to be settled by arbitration:

11. In case the said intended lessees shall at any time before the end of the said term of years apply for a lease of the Pp 309, 310.

App. (A.)

said mines and premises for the purpose of getting and raising the said coal such lease (containing all proper covenants and provisions) shall be granted to the said intended lessees either alone or jointly with such responsible persons to be named by them as the said A. B. and C. D. their heirs or assigns may think fit for the term of years from the date of such application and determinable by six months' notice in writing from the lessees to the lessors expiring at the end of any year of such term the costs of preparing and executing such lease and of these presents to be paid by the said intended lessees and any dispute as to what shall be a proper covenant or provision to be contained in the said lease to be settled by the arbitration of two arbitrators in the usual way. In witness, etc.

No. 3.—Agreement authorising Trial for Iron-ore (Short).

Memorandum that A. B. of etc. on behalf of (hereinafter called the lessor) doth hereby agree to give exclusive and irrevocable license and authority to W. C. and W. B. for the twelve months now next ensuing to work and pursue all that vein or part of a vein situate in an allotment or plot of ground on Fell now in the occupation of T. B. for the space of one thousand two hundred yards in length and twenty-five yards in breadth commencing at a point now marked out and distant about one hundred and twenty-five yards from the east wall of the said allotment and from thence extending eastward and also to work and pursue within the limits aforesaid any other veins or parts of veins which may be discovered or intersected except such parts thereof as may have been then previously demised or authorised to be worked upon the terms following which the said W. C. and W. B. do hereby accept (that is to say) (1.) That such trial or search shall be commenced within a month from the date hereof and be thenceforth proceeded with regularly by at least two able and sufficient miners daily upon the average of the whole period (2.) That the said W. C. and W. B. or their agent shall at all times give a correct account of the state of such trial to the said A. B. or to other the agent for the time being of the lessor when thereto required (3.) That one full ninth part or share of all the lead or other ore produced well washed and fit for smelting shall be regularly rendered to the lessor and that all the ore produced which shall belong to other persons shall be wholly rendered to such persons in its natural and unwashed state (4.) That in all other respects the usual terms and conditions contained in leases granted by the

Pp. 282 *et seq.*

lessor in the same district shall be observed and kept by the said W. C. and W. B. (5.) That upon non-observance of any of the above terms this agreement shall be absolutely void and forfeited. As WITNESS our hands this day of 19 .

No. 4.—Demise of Right to Search for Iron-ore, with Power to extend Demise, and with Right to a Lease [Ulverstone District].

MEMORANDUM OF AGREEMENT made this day of 19 BETWEEN A. B. etc. of the one part and C. D., E. F. and G. H. etc. of the other part Whereby it is mutually agreed as follows:

1. The said A. B. grants permission to the said C. D., E. F. and G. H. for one year from the date hereof to search for and work all veins and mines of iron-ore (already opened or unopened) lying and being within or under the lands coloured on the plan hereunto annexed with full and free liberty to open sink dig draw make and work any pits shafts levels drifts air-courses or watercourses roads or ways in or upon the said lands which may be necessary for the purpose of searching for winning and working the veins and mines of iron-ore found therein and with full and free power and authority to erect steam and water or other engines and machines engine-houses and other buildings necessary for the purpose of winning and working the same.

Pp. 285 *et seq.*

2. The said C. D., E. F. and G. H. shall make or pay all reasonable compensation for surface or other injury that any person or persons may be entitled to by reason of the carrying on and management of the said works the amount of such compensation in case of dispute to be ascertained by arbitration in the usual way and shall also pay to the said A. B. the sum of £ upon or before entering the said land and the sum of £ as soon as they shall find iron-ore therein or thereunder and will pay to the said A. B. the sum of for every 2240 lbs. of iron-ore which may be raised and gotten and sold such payments to be made half-yearly on the day of and day of next and in the first week of each month will furnish the said A. B. with a correct and proper account of the ore raised by them in the month last preceding.

Pp. 286, 315.

3. The said C. D., E. F. and G. H. shall also forthwith make or cause to be made all active and proper searches and trials for such iron-ore and on such workings shall keep not less than two able-bodied and experienced miners constantly employed in all working time (unless prevented by an influx of water impure air

Pp. 229, 303 *et seq.*

App. (A.)

or some other unavoidable occurrence) and shall pursue and work all veins and branches of veins of iron-ore which may be discovered in a regular and efficient manner according to the most approved system of mining.

4. And in case the said C. D., E. F. and G. H. shall be successful in their searches for iron-ore and shall apply to the said A. B. for a lease of the mines of iron-ore in and under the said lands the said A. B. will grant a lease thereof for a term not exceeding years in accordance with the terms of this agreement but with a reserved minimum rent of £ per annum.

Pp. 277, 311 330.

5. The said C. D., E. F. and G. H. or any of them will not during the continuance of this agreement grant or assign over these presents or the said iron-ore and premises hereby granted or any part thereof or his or their interest therein by virtue of this agreement to any person or persons whomsoever without the consent in writing of the said A. B. for that purpose first had and obtained.

6. The said A. B. shall at the expiration of twelve months from the date hereof extend this license or permission if requested so to do by the said C. D., E. F. and G. H. for a further period of one year. IN WITNESS, etc.

No. 5.—Conditions of Letting Mines of Iron-ore [Cumberland District].

Pp. 219 *et seq.*

1. The term to be for years from the day of 19 .

2. The lessees to have power to search for work and carry away all mines or veins of iron ore (as well opened or unopened) within or under the said lands subject to the restrictions hereinafter contained.

3. The lessees shall pay to the lessors by equal half-yearly payments on the day of and the day of in every year the yearly rent of £ (herein called "fixed rent") the first payment thereof to be made on the day 19 (the said rent being always in this way payable in advance) and which fixed rent shall merge in the tonnage rent hereinafter referred to and which said fixed rent is to be paid whether the lessees shall or shall not get any iron-ore from the said lands and also shall pay to the lessors half-yearly on every such day of and day of as aforesaid a further rent or royalty (herein called "tonnage rent") of for every ton of iron-ore of 2,240 lbs. avoirdupois which shall have been

raised out of the said lands during the preceding six month exceeding the equivalent number of tons represented by the fixed rent. App. (A.)

4. The lessees shall effectually fence off with good and sufficient posts and rails or in some other proper and efficient manner such part or parts of the lands as they may dig open or use in the exercise of the powers hereby given and also the pits shafts workings roads railroads and ways and all other works at any time used or made so as to protect the adjoining lands and the persons crops goods and cattle of owners and tenants thereof from all injury or danger and shall keep such fences at all times in good order and repair and make thereon a sufficient number of gates for the convenient occupation of the adjoining lands and provide sufficient and convenient communication over and across every road or way made by virtue of the powers hereby given for the use of the occupier or occupiers of the adjoining lands so that the severance of such lands may cause as little inconvenience as may be to the occupiers thereof and shall also erect and maintain on all such roads railways or ways gates or bars so as to preserve the enclosure of the adjoining lands and prevent trespasses. Pp. 434—436.

5. The lessees shall pay to the lessors for all land used for mining purposes or injured or damaged by mining operations previously to the said day of [*date of commencement of lease*] at the rate of £ per statute acre per annum payable half-yearly on the day of and day of as aforesaid and shall also pay for all additional land which they may afterwards take up use or occupy for the purposes of the said mines at the rate of £ per statute acre such payment to be made on the first half-yearly day of payment succeeding the taking of the said land The lessees shall furnish the lessors with a plan of the land taken at the time the lessees take possession of it and at the expiration or sooner determination of their tenancy the said lessees shall if they restore the land other than the land taken previously to the said day of [*date of commencement of lease*] which they may have taken up used or occupied for the purposes aforesaid to a state at least as good as when they first took possession thereof be entitled to be recouped the money paid for such land. Pp. 286 *et seq.*, 315.

6. In consideration of the aforesaid annual rent of £ per acre as aforesaid and of the condition to pay for the land taken up as aforesaid at the rate of £ per acre the lessors will exonerate the lessees from the payment of any tenant's compensation excepting for growing crops which may be on the ground at the time the land is taken up by the lessees.

App. (A.)

Pp. 237, 290.

7. The lessees to have power to make up the short workings of any of the first four years of the term during the first five years thereof and the short workings of any one year after the first four years of the term in the year immediately succeeding it.

8. The lessees are to pay the several rents duties and royalties at the times and in manner hereinbefore provided free from all existing and future parliamentary parochial and other taxes charges rates assessments duties or impositions (the property tax chargeable on landlords only excepted).

9. The lessees are to keep a weighing machine at each pit top through which the iron-ore shall from time to time be raised and to cause all ore raised to be weighed before removal in the vessels in which it is raised and the weight of the contents of each such vessel shall be entered into proper books kept in the form shown in Schedule No. 1 and to permit the lessors or their agents to be present at such weighings and the lessors shall have power to appoint a clerk or other person at their own expense to weigh the ore and to have such machines adjusted from time to time at the expense of the lessees.

Pp. 289 *et seq.*

10. The lessees are on the first Monday in every calendar month during the term to deliver to the lessors or their agent a true account in writing to be signed by them or their authorised agent of the number of vessels of iron-ore and of the number of tons of iron-ore reckoned as aforesaid which shall have been raised each day during the calendar month immediately preceding every such Monday out of the said lands and also the number of tons which shall have been removed or conveyed each day from the said lands for the purpose of sale or of shipment or for delivery to any furnace or other place for any purpose whatsoever and the respective days on which the same shall have been so conveyed and the description and owners of the carriages by which the same shall have been conveyed and the places respectively at which the same shall have been so delivered and the person or persons to whom the same shall have been so disposed of such account to be in the form stated in the Schedule No. 2 or as near thereto as may be and are also to deliver a true account of the number of persons employed during every such month in raising ore out of the said lands.

11. The lessees are on every day of and day of during the term or within seven days thereafter to make out and deliver to the lessors or their agent a true statement and account in writing of all the iron-ore which the lessee shall have raised during the preceding half-year out of the said lands.

12. The lessees are at all times during the term to keep accounts in books to be provided by them for that purpose of the weights and quantities as well of all ore from time to time raised from the mines as of all ore conveyed therefrom and during the said term and for twelve months after the expiration thereof to permit the lessors or their agents to inspect the same and to take copies thereof The lessees are also at all times during the said term and for twelve months after the expiration thereof to produce for inspection to the lessors or their agent or agents all pay-sheets banksmen's bills carters' accounts tallies accounts invoices and all other bills accounts papers and books whatsoever which may or might tend to show the quantity and weights of ore so raised or sold.

13. The lessees are to keep correct plans and sections of all workings and correct journals of bore-holes and sinkings and from time to time to produce the same to the lessors or their agents and permit them to take copies thereof and at the end of the term are to deliver the originals up to the lessors The plans and sections must be made up on the day of the day of the day of and the day of in each year.

14. The lessees are to prove and carry on the working of the mines veins and seams of ore vigorously and uninterruptedly and in a proper skilful and mining-like manner and according to the most approved practice in the winning and working of iron-ore mines of this district and in such manner as to get and raise the greatest quantity of ore which can be reasonably gotten from the same and if by any unskilfulness or careless management any of the mines veins or seams of ore be rendered incapable of being worked the same shall be paid for by the lessees as if they had been actually gotten by them.

Pp. 229, 303 *et seq.*

15. The lessees are not to work the mines from any pits outside the boundaries nor work any other mines than those demised from any pit within the boundaries unless with the previous consent in writing of the lessors and all ore so raised without such consent shall become the property of the lessors and be accounted for to them.

Pp. 231, 304, 363.

16. The lessees are to give twenty-eight days' notice in writing to the lessors or their agents of their intention to remove any pillars of ore.

17. The lessors or their agents are to have power at all times to inspect the mines and make surveys of the workings and for that purpose to use the lessees' vessels machinery and implements and to have the assistance of their workmen or agents

Pp. 267, 289 445.

App. (A.)

and the lessors are to have power to re-enter in case the mines are not worked regularly or are found upon arbitration to be improperly worked and to stop further working until satisfaction shall be made for the damage done The lessees shall not be permitted to make up any short workings which may be caused by any such stoppage as aforesaid.

Pp. 442 *et seq.*

18. If the lessees are or become during the said term the owners lessees or occupiers or in possession of any adjoining royalty and any dispute or difference arises between the lessors and lessees touching the boundary of the two adjoining royalties or any subsidence either on the surface or underground alleged by the lessors to have been caused by the workings of any such adjoining royalty or any matter of difference arising out of the contiguity of the two adjoining royalties shall arise between the lessors and lessees then the lessees shall if required by the lessors so to do permit the lessors or their agents to survey and inspect the workings of such adjoining royalty and shall also produce for inspection all surface and underground plans and sections and other documents and papers which may be necessary in the opinion of the lessors to the settlement of such dispute or difference and shall also permit the lessors or their agents to make copies of such plans and sections as aforesaid and copies of or extracts from any such documents and papers as aforesaid.

19. The lessees are not to assign or underlet without the lessors' consent in writing.

Pp. 302, 303.

20. The lessees are to have power to determine the lease at the end of the fifth tenth and fifteenth year of the term on giving twelve calendar months' notice in writing and the lease shall thereupon determine except as to any then existing breaches of covenant committed by the lessees.

21. The lessees are to maintain all shafts unless the lessors agree to their abandonment.

Pp. 264, 305, 315.

22. The lessees are to deliver up the mines at the end or other sooner determination of the term in a proper state for working and the lessors are to have the option of purchasing the engines machinery and plant belonging to the lessees (or any portion thereof) at a fair valuation to be made by two arbitrators chosen in the usual manner such valuation to be made if required by the lessors prior to the expiration or other sooner determination of the demise The lessees are to remove from the said lands all banks or heaps of iron-ore before the end or other sooner determination of the term and any ore remaining on the said lands at

the end or sooner determination of the term shall become the property of the lessors. App. (A.)

23. No building of brick or stone shall be removed from the property without the consent of the lessors and every such building standing on the property at the expiration or sooner determination of the term shall thereupon become the property of the lessors. Pp. 264, 265.

24. The lessors to have power to re-enter on non-payment of any of the rents within thirty days after the same are due or if the lessees shall make any fraudulent returns or assign or underlet without consent or on breach of any of the covenants stipulations and agreements. Pp. 234, 278, 310.

25. The lessors reserve to themselves all mines and minerals within and under the said lands (other than and except iron-ore) with power to work the same.

26. If any dispute or difference shall arise concerning the managing working or carrying on the said mines or concerning the interpretation of any of the clauses of the lease or of these terms and conditions the same to be decided by two arbitrators appointed in the usual manner. Pp. 442 *et seq.*

27. The lessors have power under the existing lease to take the machinery and plant of the outgoing lessee at a valuation Arrangements between the lessors and the outgoing lessee are being made by which possession of the machinery and plant now in the mine or such portion thereof as the lessors may think necessary is to be given to the lessors on a valuation to be made immediately before the day of [*date of commencement of lease*] and the lessees are if required by the lessors so to do to take such machinery and plant as the lessors may have agreed to take at such price or sum as may be agreed upon by the valuers of the lessors and of the outgoing lessee and shall pay such sum with the costs of the lessors' valuer and half of the other costs of the reference before the said day of .

28. The lease to contain all such other covenants stipulations and agreements as are usually inserted in leases of iron-ore in the district. Pp. 309, 310.

29. The lease and a counterpart thereof to be prepared by the lessors' solicitors at the expense of the lessees.

30. The lessors shall not be bound to accept the highest or any tender made for the said mines.

SCHEDULE No. 1.

19 .		No. of Company.	Bogies.	Gross Weight.			Tare of Bogie.			Weight of Contents.				Total.			
Month.	Day.			Tons.	Cwt.	Qr.	Cwt.	Qr.	lbs.	Tons.	Cwt.	Qr.	lbs.	Tons.	Cwt.	Qr.	lbs.

SCHEDULE No. 2.

19 .		No. of Bogies.	Weight of ore brought to Surface.			No of Carts led away.	Weight of ore removed from Surface.			Description and Owners of Carriages by which the Ore was removed.	Disposal or Destination of Ore.									Names and Situation of Iron Works, or other places where Ore delivered or sent, and names of Vessels by which Ore shipped.
											Iron Works.			Inland by Rail.			Shipped.			
Month.	Day.		Tons.	Cwt.	Qr.		Tons.	Cwt.	Qr.		Tons.	Cwt.	Qr.	Tons.	Cwt.	Qr.	Tons.	Cwt.	Qr.	
Total																				

No. 6.—Conditions for Letting three Mines of Coal [Lancashire District].

Pp. 219 *et seq.*

MEMORANDUM of the terms and conditions to be inserted in an intended lease of the Yard Mine Four Foot Mine and Five Foot Mine under part of an estate at X. lying on the south-west side of a fault the boundary of the lands under which the mines to be included in the lease are situate being more particularly defined on the plan hereunto annexed and thereon coloured .

Conditions.

1. Term years from day of 19 .

2. Fixed rent £ per annum by half-yearly payments on the day of and day of in every year the first payment to become due on the day of next.

3. Substituted or footage rent £ per foot thick per Cheshire acre for each mine horizontal measurement.

4. The lessees to have power to recoup deficiency of get below fixed rent in any future year of the term.

5. The lessees are not to have any surface rights or privileges except over the lands coloured on which at any time during the term of the lease they may in consideration of an annual payment of £ construct thereon a railway and use and enjoy the same making compensation to the tenant of the land for herbage-damage and at the end of the term restoring the site so taken if required by the lessor to agricultural land.

6. A covenant to be inserted in the lease to compel the lessees to exhaust or to pay for the mines whether gotten or not during the term.

7. Liberty to be reserved to the lessor or his nominees to sink through the mines to be demised to the underlying mines.

8. The lessees to have usual allowances for faults and full outstroke and instroke in the mines underground.

9. Lease and duplicate to be prepared by the lessor's solicitor at cost of lessees and such lease and duplicate to contain all other clauses etc. usually inserted in leases of coal mines in the district.

10. The lessees immediately upon signing this memorandum to have liberty to enter and work.

DATED, etc.

(B.) CONVEYANCES OF MINES,—AND EXCEPTIONS OF MINES.

No. 1.—Conveyance of Mines, on a Sale thereof.

Pp. 253 *et seq.* This indenture made, etc. Between A. B. of, etc. of the one part and C. D. of, etc. of the other part Witnesseth that in consideration, etc. [*the receipt clause*] the said A. B. as beneficial owner hereby conveys unto the said C. D. and his heirs All and singular those the mines veins and seams of coal and ironstone and all other mines and minerals whatsoever situate and lying in or under the several parcels or closes of land and hereditaments (containing in the whole acres or thereabouts) which are described with the abuttals and acreage thereof in the schedule hereunder written Together with full and free liberty for the said C. D. his heirs and assigns and his or their lessees agents and workmen and all other persons by his or their or any of their authority or permission at any time and from time to time *but by outstroke and underground workings only and without entering upon the surface* of the said parcels or closes of land and hereditaments described in the said schedule hereunder written or any of them to search for get work take away and dispose of the said mines and minerals hereby conveyed and also any other mines or minerals lying and being within or under any adjoining or neighbouring lands and to do all things necessary or expedient for the purposes aforesaid or any of them But subject to the liability to make compensation to the said A. B. his heirs and assigns lessees and tenants (the owners or occupiers for the time being of the surface of the said parcels or closes of land and hereditaments described in the said Schedule hereunder written) for all and any damage or injury to the surface or any buildings thereon which shall or may be caused or occasioned by or by reason of the exercise of the liberties powers and authorities hereinbefore contained or any of them To hold the said mines and minerals and all other the premises hereby conveyed (subject as aforesaid) unto and to the use of the said C. D. in fee simple for ever. In witness, etc. *

The Schedule. [*To contain a description of the surface.*]

No. 2.—Exception of Mines in Conveyance,—without disturbance of Surface in any way.

Pp. 253, 275. Excepting and always reserving out of these presents and the direction appointment grant and conveyance hereby made unto

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* *Any required variations, as to compensation or otherwise, can be inserted.*

the said X. [*grantor*] his appointees heirs and assigns all mines veins and seams of coal cannel and ironstone and other mines and minerals lying within or under the said piece of land hereby appointed granted and conveyed or any part or parts thereof respectively with full liberty power and authority for the said X. his appointees heirs and assigns and his their or any of their lessees agents and workmen and every or any other person or persons by his their or any of their order or permission at any time or times and from time to time to search for get win take cart and carry away the same and sell and convert to his and their own use the said excepted mines veins and seams of coal cannel and ironstone and other mines and minerals or any of them or any parts or part thereof at pleasure and to do all things necessary for effectuating all or any of the purposes aforesaid *but without entering upon the surface of the said lands or any part thereof and so as not to disturb the said surface or any part thereof by or in consequence of underground workings.*

Pp. 396, 409.

No. 3.—Exception of Mines in Conveyance,—with Disturbance of Surface otherwise than by Subsidence.

EXCEPT and reserving unto the said A. B. his heirs and assigns all and every the mines veins strata and seams of copper lead iron and coal (unopened as well as opened) in under or upon the hereditaments hereby granted and assured with full and free liberty and authority for the said A. B. his heirs and assigns and his or their agents workmen or servants to search for work take and carry away the same for his and their own use and benefit and to dig sink drive make and use all such shafts pits levels adits airgates watercourses and other works which may be required for winning and working the said mines and minerals according to the most approved practice for the time being adopted in similar mines in the district and also to appropriate and use any part of the lands hereby granted and assured either underground or on the surface as may be proper as well for depositing and laying down the said minerals and placing and heaping the waste refuse and rubbish which may be worked along with them from time to time as for washing and cleansing any of the said minerals and for effectually separating them from all the soil and other substances mixed with them and also for supplying such mines and works with water and with good and fresh air or for freeing the same from water or foul air and for the purposes aforesaid to erect make and employ all such fire steam water or other engines buildings workmen's houses shops crushing mills sheds hovels machinery and works which may be proper and reasonable

Pp. 253 *et seq.*, 396 *et seq.*

App. (B.)

and which are now or may be hereafter used for similar purposes and also with full liberty and authority to construct or repair and use any railroads or other roads or ways which may be reasonably required for the effectual working and management of the said mines and works or for the delivery of the said minerals PROVIDED ALWAYS that all such minerals which shall have been so produced shall be taken away from the lands hereby granted and assured within a reasonable period from the time of their production PROVIDED ALSO that the said A. B. his heirs and assigns shall from time to time make compensation in money equal to three times the amount of ordinary compensation to the owners and occupiers for the time being of the said lands and premises hereby granted and assured in respect of the injuries sustained by them in the prosecution of the mines and works aforesaid whether such injuries be of a permanent or of a temporary nature and such compensation shall apply as well to all buildings erected thereon after the day of the date of these presents as previously and to all new improvements of the surface generally.

Pp. 286 *et seq.*, 401 *et seq.*, 416 *et seq.*

No. 4.—Exception of Mines in Conveyance,—with Disturbance of Surface by Subsidence, as well as by User of Surface.

Pp. 275, 287.

[*N.B.—Form No.* 3 *above, inserting between the word* "district" *and the words* "and also" *in the twelfth line the words following*: "with full power to occasion a subsidence of the surface if such subsidence should result or arise while working according to such approved practice."]

No. 5.—Exception of Mines, with Disturbance of Surface by Subsidence only [Short Form].

Pp. 275, 287, 315, 319, 396, 404, 416, 423.

EXCEPT and reserving out of the conveyance hereby made all the mines and minerals whatsoever (unopened as well as opened) in or under the hereditaments hereby assured with full liberty to search for win work and carry away the same *by means of outstroke or underground workings only* and with full liberty to make use of or employ any such underground workings for any purposes whatsoever PROVIDED ALWAYS that reasonable compensation be made from time to time for all injuries to the surface or to the buildings thereon which may be sustained by the owners or occupiers for the time being of the said hereditaments by reason of the prosecution of the mines and works aforesaid.

No. 6.—Exception of Mines in Building Lease,—with Right to damage Surface by Subsidence without paying Compensation.

EXCEPT and reserved out of this demise all mines seams beds and veins of coal and cannel and other mines minerals mineral substances and quarries lying under the said demised land with full power and free liberty to and for the lessor and all and every or any person or persons whomsoever claiming or to claim from or under him or the said X. deceased [*testator*] or any of his ancestors (whether by virtue of the will of the said X. deceased or of any lease or assurance or agreement or leases or assurances or agreements whatsoever made by him or by the said X. deceased or any of his ancestors or in any other lawful manner whatsoever) and his and their lessees tenants stewards bailiffs workmen and others by his and their authority at all times henceforth during the continuance of this demise at his or their pleasure *but without entering upon the surface of the said demised land* except under powers already conferred or agreed to be given in or by any lease or assurance or agreement already made or subsisting to get win carry away sell and dispose of the said coal and cannel and other mines minerals mineral substances and quarries and every or any part thereof respectively either alone or together with any coal cannel and other mines minerals mineral substances and quarries within or under any adjacent or other lands *and either with or without leaving support to the surface and whether the surface or any buildings thereon for the time being may or may not be thereby lowered or depressed or injured in anywise and without any liability whatever to make compensation for any injury to the surface or to any buildings thereon for the time being.*

Pp. 401, 406.

No. 7.—Exception of Mineral Ways in a Farming Lease.

EXCEPT and reserved at all times during the continuance of this demise unto the said [*lessor*] his heirs and assigns full and free liberty and authority to use and appropriate all such pieces or parcels of land as may at any time hereafter be required by the said [*lessor*] his heirs or assigns or any other person whomsoever for the purpose of forming any railways or other ways for the conveyance of coal or any other minerals articles or materials whatsoever or of passengers and in any manner whatsoever or which may be reasonably required for the proper use and enjoyment of any such ways or for the purposes connected therewith with full liberty and authority to convert such pieces or parcels of land for the purposes aforesaid and to do all necessary and

Pp. 41, 230, 275, 360 *et seq.*

App. (B.)

proper acts for making repairing and maintaining in proper order and condition any such ways and for effectually draining and fencing off the same from any of the adjoining lands comprised in this demise PROVIDED ALWAYS that the said [*lessor*] his heirs and assigns or other persons aforesaid shall make all proper and reasonable compensation to the said [*lessee*] his executors administrators or assigns for the injuries sustained by him or them in the formation and maintenance of any such ways or works aforesaid and shall at all times during the said term effectually fence off the same from any of the adjoining lands hereby demised and also that the said [*lessor*] his heirs or assigns shall at all times make all proper abatements and allowances in the amount of the rent hereby reserved, in consequence of such ways and works.

Pp. 286 *et seq.*

Pp. 434—436.

(C.) LEASES OF MINES; AND OF SMELTING WORKS, SALT WORKS, ETC.

No. 1.—Iron-ore,—Lease of, in pursuance of Prior Agreement [Ulverston District].

THIS INDENTURE made the day of 19 BETWEEN Pp. 273 *et seq.*
A. B. etc. of the first part C. D., E. F. and G. H. etc. of the second part and K. and L. of the third part WHEREAS [*recite the memorandum of agreement*] AND WHEREAS [*recite any extension of agreement*] AND WHEREAS the said C. D., E. F. and G. H. have requested that the said lease may be granted to the said K. and L. NOW THIS INDENTURE WITNESSETH that in consideration, etc. SHE the said A. B. at the request and by the direction of the said C. D., E. F. and G. H. testified, etc. DOTH hereby grant and demise ALL and singular [*parcels*] Together with full P. 273.
and free liberty to open sink, etc. pits, etc. and also to build erect and set up or re-build or re-erect upon the said lands any P. 274.
steam-engines, etc. TO HAVE AND TO HOLD, etc. for the term of
years to be computed from, etc. YIELDING AND PAYING P. 276.
unto the said A. B. etc. the clear yearly rent of £ and also YIELDING AND PAYING unto the said A. B. etc. the further rent or royalty of *s.* *d.* for every ton of 2,240 lbs. avoirdupois of iron-ore raised or gotten out of the said lands during the said term over and above the quantity of tons PROVIDED ALWAYS
and it is hereby covenanted and agreed between the said parties Pp. 237, 290.
hereto that if in any one year of the said term the royalty hereinbefore reserved and made payable in respect of the said mines and minerals hereby demised shall not amount in the whole to the said sum of £ and if in any succeeding year or years of the said term (not being further removed than seven years) the said royalty shall amount to a greater sum than the said sum of £ in the whole the lessees shall be allowed in every such succeeding year to deduct from the excess of such royalty over and above the said sum of £ the amount by which the same royalties were in any of such former years respectively less than the said sum of £ so far as the excess in any such succeeding year will go or extend to make up the deficiency in any such former year as aforesaid [*Payment of rents without deduction (except landlord's property tax) on specified half-yearly days, and covenants by lessees to pay same, and also all taxes, etc.*] AND ALSO shall and
will at all times during the continuance of this demise work the Pp. 277, 303
said mines veins beds and seams of iron-ore in a workmanlike *et seq.*
and effectual manner with the utmost vigilance and attention to the interest profit and advantage of the said A. B. etc. according

App. (C.)

to the best and most improved mode of carrying on works of a similar description in the neighbourhood and to that end shall and will keep not less than able-bodied experienced miners constantly employed in all working time upon the said mines and works unless prevented by an influx of water impure air or some unavoidable occurrence [*and maintain engines to drain and also effectually drain works*] And also shall and will preserve a due level in the watercourses and drains and keep and leave all the airways belonging to the said works in a good open condition And also shall and will leave sufficient supports to the levels and drifts within the said mines or shafts thereof so as to keep the said mines in a proper condition for working at all time during the said term or until the minerals in such levels or drifts are worked out And also shall not nor will work or get any minerals or interfere with the substrata under [*certain specified buildings*] And also [*rights of A. B. etc. to descend and inspect pits, etc.*] And also [*erect weighing machines, etc. keep proper books, etc. showing works and give copies, etc. to A. B. etc. And also verify (if required) by statutory declaration and will keep books, etc. safe and deliver up at expiration of term all plans, etc.*] And also shall and will at their own costs and charges fill up and level all the pits and trenches that shall be made and dug by them in or upon the said lands for the purpose of working getting and raising the said iron-ore as soon as the same shall cease to be used Provided that no pit shall be filled up until after fourteen days' notice of such intended filling up shall have been given to the said A. B. etc. or his or their agent and also [*maintain the works*] And also shall not nor will cover over or bury any earth or soil upon any of the said lands but shall and will at the expiration of the said term or within three calendar months thereafter restore the said lands or such parts or part thereof as shall from time to time be damaged in carrying on the said works to a state fit for agriculture and also shall and will [*make compensation to tenants, etc. and indemnify lessor, etc. against same, etc.*] And also will pay to the said A. B. etc. double the value for agricultural purposes of all such portions of the said lands as the lessees may be unable to restore and render fit again for agricultural purposes And also [*not assign or underlet without consent, but deliver up, etc.; right of distress in case rent unpaid for twenty-eight days*] Provided also and it is hereby expressly agreed and declared by and between the parties hereto that in case the said several royalties rents or sums of money hereby reserved and made payable or any of them or any part thereof respectively shall not be rendered or paid for the space of twenty-eight days next after any of the days hereinbefore appointed for

Pp. 3, 19, 262, 336, 429.

Pp. 286 *et seq.*

Pp. 234, 278, 310.

the payment thereof respectively and no sufficient distress or distresses can or may be had or found in the said premises to satisfy the same or if the lessees shall not in all things well and truly observe and perform fulfil and keep all and singular the covenants conditions provisions and agreements herein contained and on their parts and behalves to be observed and performed fulfilled and kept or if the lessees do or shall at any time during the said term hereby demised assign or part with this present indenture of lease or with the possession of the said demised premises or any part thereof or shall sell or let the said hereby demised premises or any part thereof to any person or persons whomsoever for all or any part of the said term without such consent as aforesaid or shall wittingly or willingly do or suffer or cause or permit to be done or suffered any act or thing whatsoever whereby or by means whereof the said mines and minerals hereby demised or any part thereof shall or may come into the hands or possession of any person or persons whomsoever other than the lessees without the license and consent of the said A. B. etc. first had and obtained or if the lessees shall become bankrupt or make any arrangement with or assignment for the benefit of their creditors or suffer their goods to be taken in execution then and in any of the said cases and from thenceforth (except any trustee assignee mortgagee or other duly authorised and sufficient person shall within six calendar months after the date of such bankruptcy assignment composition arrangement seizure or taking in execution tender to the lessor a duly perfected covenant binding such persons to carry on the said mines and premises upon the terms and in manner herein appearing) it shall and may be lawful to and for the said A. B. etc. into and upon the said mines, etc. or any part thereof in the name of the whole to re-enter and to take and keep possession thereof and of all buildings erections and edifices pits and shafts erected opened or made in the said land and premises and the same to have again re-possess and enjoy as in his or their former estate and the lessees and all other tenants and occupiers of the same premises thereout and from thenceforth utterly to expel put out and remove this present indenture or anything herein contained to the contrary notwithstanding AND then also in any of the said cases it shall and may be lawful to and for the said A. B. etc. and agents, etc. to enter into and upon all or any of the said premises hereby demised and there to have seize and take possession of all or any of the engines whimseys gins barrels ropes tackle utensils goods chattels and effects used or employed in carrying on the said works or which shall then and there be found on the said demised premises and to stop and hinder the

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lessees, etc. from working and carrying on the said works and to put out and remove them from the possession thereof and to sell and dispose of the said goods chattels effects and premises in or towards payment and satisfaction of the said respective royalties rents and payments which may then be in arrear and unpaid and also for the said A. B. etc. and his and their agents, etc. from thenceforth to carry on the said mines and works to and for his and their own use and benefit in case he or they think fit so to do And then and from thenceforth this present indenture and the term and estate hereby demised and every clause matter and thing herein contained shall cease determine and be void except so far only as shall relate to the recovery of any of the said royalties rents or payments hereby reserved which shall be then in arrear or the obtaining satisfaction for any breach or breaches of any of the covenants or agreements herein contained [*Lessor's*

Pp. 277, 323.

covenant for quiet enjoyment] Provided also and it is hereby further agreed and declared that if at any time during the con-

Pp. 442 *et seq.*

tinuance of this demise or after the expiration of the same any doubt or question shall arise concerning this indenture or any matter or thing whatsoever connected with the said mines and minerals or the working or non-working thereof then and in every such case the matter in difference shall be referred to two arbitrators or their umpire pursuant to and so as with regard to the mode and consequences of the reference and in all other respects to conform to the provisions in that behalf contained in the Arbitration Act 1889. In witness, etc.

No. 2.—Iron-ore, Lease of,—in accordance with Prior Conditions of Letting [Cumberland District].

Pp. 273 *et seq.*

This indenture made, etc. Between A. B. and C. D. etc. (hereinafter called the lessors) of the one part and E. F., G. H. and K. L. etc. carrying on business under the name of the M. I. Company (hereinafter called the lessees) of the other part witnesseth that in consideration, etc. the lessors do and each of them doth hereby demise and grant unto the lessees their executors, etc. all those mines veins seams or beds of iron-ore lying and being in or under [*parcels*] delineated, etc. on plan, etc. but such plan is to be taken as explanatory only and not as extending or abridging the general description hereinbefore contained Together with liberty for the lessees their executors,

Pp. 274, 360.

etc. from time to time and at all times during the term hereby granted to enter upon the said lands and search for mines veins beds and seams of iron-ore and dig and raise the iron-ore there found and to stack and deposit the same when raised in heap-rooms in or upon any part or parts of the said lands and to carry

away and dispose of all the ore which may be so found and produced and for the purposes aforesaid to sink drive make erect repair and use all such pits shafts adits levels drifts sumps headways watercourses airgates passages steam-engines breaks gins and other machinery and works as may be found necessary or expedient for effectually working the mines hereby demised and for draining and discharging the water therefrom and supplying the same with pure air and freeing the same from impure air in the best and most efficient manner AND ALSO to construct railways tramways carriage and other ways in through or over the said estate to or from any convenient places of delivery for any purposes connected with the enjoyment of the mines hereby demised and the sale and delivery of the produce thereof so as that such railways, etc. be made only on such parts of the aforesaid parcels of land as shall be approved by the said lessors their heirs and assigns and generally to do all acts and things which shall from time to time be deemed necessary or expedient for effectually working the said mines and disposing of the produce thereof EXCEPTING AND RESERVING unto the said lessors their heirs, etc. so much and such parts (if any) of the said demised mines, etc. as the lessors their heirs, etc. shall find it necessary to remove and shall remove in boring for sinking working winning ventilating or draining all or any of the mines minerals or substances whatsoever in and under the lands hereinbefore described other than and except the said demised mines veins seams or beds of iron-ore and as shall be necessary or proper to be left for the support of all such shafts already sunk or hereafter to be sunk as the said lessors their heirs, etc. shall not agree to be abandoned AND EXCEPTING AND RESERVING unto the said lessors their heirs, etc. all mines and minerals and mineral substances whatsoever other than and except iron-ore which shall be dug won gotten or found in or under the said lands hereinbefore described together with liberty for them the said lessors their heirs, etc. to search for and work the same and to erect and construct all such works machinery and other conveniences as may be necessary for effectually raising and winning the minerals and substances there found and for dressing and making the same merchantable and fit for sale and for such purposes to make use of and deepen all or any of the pits shafts adits drifts passages and other works now existing or which may hereafter be made by the said lessees their executors, etc. in or upon the said lands or any parts thereof when such pits shafts drifts adits passages and other works shall have been discontinued and so as that the said lessors their heirs, etc. shall make such reasonable compensation unto the said lessees their executors, etc. for all damage injury

Pp. 366—368.

Pp. 40, 255 *et seq.*, 275.

Pp. 41, 275.

Pp. 42, 286, 315.

App. (C.)

or interruption occasioned to them in the enjoyment of the mines and premises hereby demised and the liberties hereby granted by reason or in consequence of this present exception And excepting and reserving unto the lessors their heirs, etc. liberty at all seasonable times during the term hereby granted to enter upon the said demised mines seams and beds of ore and to go through survey and inspect the same and the works connected therewith To have and to hold the said mines, etc. and premises subject to the exceptions and reservations hereinbefore expressed unto the lessees their executors, etc. for the term of years from

Pp. 276, 287.

the day of Yielding and paying therefor during the said term the certain yearly payment of £ by equal half-yearly payments on the day of and day of the first of such half-yearly payments to be made on the day of and so on from half-year to half-year the said rent being always payable in advance if demanded For or in respect of which said certain half-yearly payments of £ the lessees may in every half-year raise out of and from the said lands and premises such other quantity of iron-ore as at the rate hereinafter mentioned would yield or pay for that half-year a tonnage rent equal to the said certain half-yearly payment of £ And also yielding and paying on the day of and day of in each year for or in respect of every ton of 2,240 lbs. of iron-ore which shall be raised out of the said parcels of land in the course of the six calendar months preceding such day of and day of over and above the quantity which the lessees are hereby authorised to raise in respect of the said certain half-yearly payments the royalty or sum hereinafter mentioned that is to say when the selling price as hereinafter defined of iron-ore shall not exceed 13*s.* per ton of 2,240 lbs. the royalty or sum of 3*s.* 6*d.* per ton of 2,240 lbs. and for every 2*s.* 6*d.* per ton rise in such selling price the additional royalty or sum of sixpence and so in proportion for every rise which shall be less than 2*s.* 6*d.* per ton the first half-yearly payments to be made on the day of

Pp. 237, 290.

Provided always and it is hereby agreed and declared that if and whenever the lessees or their assigns shall for any year have paid the minimum yearly rent of £ without having actually raised in such one year such a quantity of iron-ore as according to the tonnage rent hereinbefore reserved for or in respect of that year would have produced a yearly rent of £ then the lessees their executors, etc. may in the first year of the said term immediately succeeding raise such a quantity of iron-ore as at the tonnage rent payable in the year they shall not have actually raised such quantity as aforesaid shall be sufficient to make up the deficiency without paying any rent or royalty in

respect thereof PROVIDED ALWAYS and it is hereby agreed and declared that for the purpose of estimating the amount of tonnage rent payable under and by virtue of these presents the selling-price of ore for any half-year ending the 4th day of June or 4th day of December shall in case of dispute be referred to arbitration under the provision in that behalf hereinafter contained and the arbitrators or the umpire to be appointed by them shall ascertain and fix the same by reference to the average selling value at the pit's mouth during such half-year of the iron-ore raised from the mines known as [*certain specified mines in locality*] or in the event of the whole of those mines becoming exhausted or ceasing to be wrought from other iron-ore mines in [*certain specified parishes in the neighbourhood*] AND YIELDING AND PAYING for or in respect of every acre of the aforesaid lands which previous to the said day of had been used for mining purposes or injured or damaged by mining operations the yearly sum of 5*l.* per acre and so in proportion for any less quantity than one acre by equal half-yearly payments on the day of and day of the first of such half-yearly payments to be made on the day of next AND YIELDING and rendering for the use and benefit of the lessors all iron-ore which without the previous consent in writing of the lessors shall be raised out of the aforesaid parcels of land by means of pits or shafts made or sunk outside the boundaries thereof or which without such consent as aforesaid shall be raised out of lands other than the said parcels of land hereinbefore described by means of pits or shafts made or sunk within the boundaries of such last-mentioned parcels of land AND YIELDING AND PAYING in the event of the said term being determined by re-entry under the proviso hereinafter contained a proportionate part of the said certain and surface rent for the fraction of the current half-year up to the day of such re-entry the said several rents and royalties to be paid clear of all deductions except landlord's property or income tax PROVIDED ALWAYS and it is hereby agreed and declared that if and whenever any part of the said several yearly and other rents royalties or renders hereby reserved shall be in arrear for days whether the same shall have been legally demanded or not the lessors their heirs or assigns may enter upon the premises and stop and hinder the getting raising or removing the said iron-ore and also seize and distrain all iron-ore actually gotton or raised and all horses waggons carts and other carriages engines machinery apparatus tools ropes rollers and other materials live or dead stock goods chattels and effects whatsoever for the time being in and about the said mines and other premises hereinbefore expressed to be hereby demised or in or about any lands which may have

Pp. 237, 293.

P. 355.

Pp. 293, 297.

App. (C.)

been entered upon and used under or by virtue of these presents and every distress then made may take away sell or dispose of as in cases of distress for rent reserved in common leases and out of the monies arising thereby retain such monies as shall be requisite for the purpose of satisfying the said arrears and all
Pp. 277 *et seq.*
expenses incurred by him or them And the lessees do hereby and as a separate covenant each of them doth hereby covenant with the lessors that they the said lessees or one of them their or one of their executors administrators or assigns will during the said term pay unto the lessors their heirs and assigns the said several rents royalties and renders hereinbefore reserved at the times and in manner hereinbefore appointed for payment thereof clear of all deductions And pay all existing and future taxes rates assessments and outgoings of every description for the time being payable either by landlord or tenant in respect of or charged upon the premises or any land erection machinery or work to be entered upon set up or made under or by virtue of these presents (landlord's property or income tax only
Pp. 286, 315.
excepted) And also shall and will pay to the said lessors their heirs and assigns for all lands the surface of which shall after the day of have been or shall hereafter during the said term be broken damaged or permanently destroyed by being taken or used for the purposes of the said mines or of the exercise of all or any of the liberties powers and authorities hereby granted and conferred at the rate of £ for every acre and after that rate for any quantity more or less than an acre such payment to be made on such of the half-yearly days of payment hereinbefore mentioned as shall happen next after the land shall have been so taken or used as aforesaid but if at the expiration or sooner determination of the said term the lessees
Pp. 262, 336, 429.
shall restore the said land so taken and used after the said day of to a state at least as good as when they first took possession thereof then and in such case they shall be entitled to be repaid such sum or sums of money as under and by virtue of this clause they shall have paid in respect thereof And also shall and will on demand pay sufficient compensation to the tenant or occupier tenants or occupiers for the time being in possession of the said lands the mines under which are hereby demised for any injury or damage which may be done to the crops growing on the lands the surface of which shall be so taken or used as aforesaid at the time such lands shall be so taken or used
Pp. 277, 311, 330.
And also that the said lessees their executors administrators and assigns shall not nor will during the term hereby granted assign or underlet or otherwise part with the possession of the mines liberties powers and premises hereby granted and demised or any of them or any part thereof without the license in writing

of the lessors their heirs or assigns AND shall not nor will at any time during the said term grant to any person or persons whomsoever any way-leave drift outstroke watergate or water-course or other communication whatsoever either from or into any of the said mines upon into or over the premises hereby demised or any part thereof without such license as last aforesaid AND shall and will keep at each pit through which the iron-ore to be drawn from the mines veins seams or beds hereby demised shall from time to time be raised a weighing-machine with steel-yard lever of the most approved construction for shewing 112 lbs. to every 1 cwt. and 20 of such cwts. to 1 ton for the purpose of weighing the ore which shall from time to time be raised or gotten as aforesaid and shall cause all such ore to be weighed by such machine or machines as soon as the same shall be raised and before the removal of any part thereof from the vessels in which it is raised AND will enter the weight of the contents of each such vessel in proper books to be kept in the form shown in the first schedule hereunder written AND shall and will permit the said lessors their heirs and assigns and their agents or stewards or clerks to be present at the time of weighing such ore and to weigh the same and from time to time to use and adjust the said machine or machines for the purpose of ascertaining the weight of the ore raised and got from the said mines and premises and will pay to the lessors their heirs and assigns all costs and expenses incurred in adjusting such machines AND ALSO shall and will on the day of and the day of in each year during the said term or within days thereafter make out and deliver to the lessors or their agent a true statement in writing of all the ore which the lessees shall have raised during the preceding half-year from out of the said mines and premises hereby demised AND ALSO shall and will on the first Monday in every calendar month during the said term make and deliver to the lessors or their agents a true account to be signed by them or their authorised agent of the number of tons of iron-ore reckoned as aforesaid which shall have been raised each day during the preceding calendar month out of the said mines and premises hereby demised and also the number of tons which shall have been removed or conveyed each day during the preceding calendar month from the said lands for the purpose of sale or of shipment or for delivery to any furnace or other place for any purpose whatsoever and the respective days on which the same shall have been so conveyed and the description and owners of the carriages by which the same shall have been conveyed and the places respectively at which the same shall have been so delivered and the person or persons to whom the same shall have been so disposed of such account to be in the form stated in the

Pp. 267, 445.

Pp. 289, 320.

App. (C.)

second schedule hereunder written or as near thereto as may be And shall and will also make out and deliver a true account of the number of persons employed during such month in raising ore out of the said mines and premises And also shall and will at all times during the said term keep accounts in books to be provided by them for that purpose of the weight and quantities as well of all ore from time to time raised from the said mines and premises hereby demised as of all ore conveyed therefrom for the purpose of sale or shipment or for delivery to any furnace or any other place for any purpose whatsoever such accounts to contain particular and correct entries of the several times and dates of raising getting and conveying away of such ore And shall and will during the said term and for twelve months after the expiration or sooner determination of the said term permit the lessors or their agent to inspect the same and to take copies thereof And also shall and will at all times during the said term and for twelve months after the expiration or sooner determination of the said term produce for inspection to the lessors or their agent or agents all pay-sheets bankmen's bills carters' accounts invoices and all other bills accounts papers and books whatsoever which may or might tend to show the quantities and weights of the ore so raised and conveyed therefrom And further that the said lessees their executors, etc. shall and will from time to time and at all times during the said terms make and keep correct maps and plans of the said mines hereby demised and of all the workings thereof and also of all the workings hereafter to be made therein and of all faults dykes veins loads and obstructions and the true courses and bearings thereof discovered therein or in the working thereof and all drains levels adits drifts aircourses ways open workings and other works as well under ground as above ground either for the winning and working of the said mines and premises hereby demised or any of them or which may have any communication or connection with or opening into the same or any part thereof and of all pits shafts and bore-holes to be sunk bored or used for the working and winning of the said mines and each respective seam band vein or deposit thereof and also a book or journal containing an account of all the borings and sinkings through the several strata and will mark and delineate on the said map or plan the true position where such pits or borings shall have been sunk or bored and the correct depths from the surface And also shall and will from time to time on the day of the day of the day of and the day of in every year of the said term delineate and lay down on the said maps and plans in a plain and intelligible manner all the several particulars aforesaid and the extent and direction to and in which each of the said seams bands veins

Pp. 267, 289, 445.

lodes or deposits of iron-ore shall from time to time be worked and all other things necessary to give full and satisfactory information concerning the winning and working of the said mines and the state and condition thereof AND will from time to time upon request produce the said several maps plans and books or journals for the perusal or inspection of the said lessors their heirs, etc. and permit copies or extracts thereof to be made by them respectively without hindrance and will at the end or sooner determination of the said term give up all the said maps plans books and journals to the said lessors their heirs, etc. AND also shall and will at all times during the said term effectually fence off with good and sufficient posts and rails or in some other proper and efficient manner such part or parts of the lands the mines under which are hereinbefore expressed to be hereby demised as they may dig open or use in the exercise of the powers hereby given and also the pits shafts workings roads and ways and all other works already made or at any time hereafter to be used or made by the lessees so as to protect the adjoining lands and the persons crops goods and cattle of the owners or tenants thereof from all injury and shall keep all such fences at all times in good order and repair and make therein a sufficient number of gates for the convenient occupation of the adjoining lands and provide sufficient and convenient communication over and across every road and way made by virtue of the powers hereby given for the use of the occupier or occupiers of the adjoining lands so that the severance of such lands may cause as little inconvenience as may be to the occupiers thereof AND shall and will erect and maintain on all such roads or ways gates or bars so as to preserve the enclosure of the adjoining lands and prevent trespass AND also shall and will at all times during the said term carry on the working of the mines beds veins seams and bands of ore hereinbefore demised vigorously and uninterruptedly in a proper skilful and mining-like manner and according to the most approved practice in the winning and working of mines in the neighbourhood and in such manner as to get and raise the greatest quantity of ore which can be reasonably gotten from the same AND if by any unskilfulness or careless arrangement any of the mines veins or seams of ore be rendered incapable of being worked the ore therein is to be paid for by the lessees as if the same had been actually gotten AND will not unless with the previous consent in writing of the lessors their heirs, etc. work the said mines, etc. of ore from any pits outside the boundaries of the said lands hereinbefore described and will not unless with such previous consent as aforesaid work any mines, etc. other than the mines, etc. hereby demised from any pit within the said boundaries AND will not remove the said pillars of ore in the

Pp. 434—436.

Pp. 229, 303 *et seq.*

Pp. 231, 304, 363.

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said mines, etc. whether the same shall be necessary or proper to be left or not without giving to the lessors, etc. twenty eight days' previous notice in writing of their intention to remove the same And shall at all times during the said term maintain in good repair all shafts already sunk or hereafter to be sunk and whether the same shall be unfit for the future working of the said mines, etc. or not And also shall and will cause to be laid aside in heaps all the earth and soil which shall be dug up and raised in working the said mines And shall not nor will at any time during the said term hereby granted do or suffer to be done any wilful or negligent act matter or thing which may hazard endanger or occasion loss or damage to the said mines, etc. or the works thereof respectively And also shall and will from time to time and at all reasonable times during the said term permit and suffer the lessors, etc. as often as they think proper and also their stewards, etc. to enter upon go down and come up from the said mines and to view the state thereof and to inspect and examine dial measure and survey the same and the pits shafts adits drifts and workings to be made in pursuance of these presents and for the purposes aforesaid to make use of the tackle ropes vessels machinery implements and utensils of the said lessees their executors, etc. and to have the assistance of their workmen and agents And also that if the said lessees their executors, etc. now are or if during the said term they shall become owners lessees or occupiers or in possession of any adjoining mines and any dispute or difference shall arise between the lessors and lessees touching the boundary of the mines hereinbefore demised and such adjoining mines or any subsidence shall happen either on the surface or undergound alleged by the lessors to have been caused by the workings of any such adjoining mines or if any matter of difference arising out of the contiguity of the two adjoining mines shall arise between the lessors and the lessees then the lessees shall if required so to do permit the lessors or their agents to enter upon and survey and inspect the workings of such adjoining mines in such and the same manner and with such powers and privileges as are hereinbefore expressed with respect to the said mines, etc. hereby demised And shall also produce for inspection all surface and underground plans and sections and other documents and papers which may be necessary in the opinion of the lessors to the settlement of such dispute or difference and shall also permit the lessors, etc. to make copies of such plans and sections as aforesaid and copies of or extracts from any such documents or papers as aforesaid and will at the expiration or sooner determination of the said term deliver up to the lessors their heirs, etc. the said mines, etc. hereinbefore expressed to be hereby demised together with all ore which at

Pp. 267, 289, 445.

the date of such expiration or determination shall be on the lands and premises hereby demised together with all erections and buildings except such as the lessees their executors, etc. are hereinafter authorised to remove and shall remove in as good a state and condition as the nature of the case will admit of and as shall be consistent with the due performance of the several covenants herein contained PROVIDED ALSO and it is hereby agreed and declared that the lessees their executors, etc. may at any time before or within three calendar months after the expiration or sooner determination of the said term take down remove and convert to their own use the materials of all such engines plant machinery rails and works (except as hereinafter is mentioned) as now are or shall have been erected set up fixed or made upon to or under the aforesaid lands or any part thereof for working getting or carrying away the said mines hereinbefore expressed to be hereby demised or used in connection therewith making reasonable satisfaction for all damage that may be done to the same lands by such removal but except for the purpose of re-building the same on some other part of the said lands or of repairing the same and except so far as may be necessary for the removal of any engines or machinery thereon the lessees their executors, etc. shall not be at liberty to remove or pull down wholly or partially any buildings of brick or stone which now are or hereafter during the said term may be erected on the same lands PROVIDED ALWAYS and it is hereby agreed and declared that in case the lessors their heirs, etc. shall before or upon the expiration or determination of the said term be desirous of purchasing all or any part of the engines plant machinery rails works tools implements utensils or materials for the time being used or employed in or about the working of the said mines and of such desire shall give one calendar month's previous notice in writing to the lessees their executors, etc. then the lessees their executors, etc. shall when and so soon as the same shall cease to be used by them leave for and deliver up to the said lessors their heirs, etc. such of the said things as shall be so required in as good a state and condition as the same shall be in at the time of giving such notice subsequent reasonable tear and wear only excepted the lessors their heirs, etc. paying for the purchase thereof such a price as shall in case of difference be ascertained by arbitration under the provisions hereinafter contained PROVIDED ALWAYS and it is hereby agreed and declared that if the the lessees their executors, etc. shall at any time or times during the said term be found upon an arbitration to be conducted as hereinafter provided to be working or using the said mines or any of them in an improper unskilful or unmining-like manner or contrary to the true intent and meaning of these presents then

Pp. 263—265.

Pp. 234, 278, 310.

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and in every such case it shall be lawful for the said lessors their heirs, etc. to re-enter and take possession of all and singular the said mines and premises and to stop and discontinue the working thereof until full satisfaction shall be made by the said lessees their executors, etc. for all damage loss or injury which shall have been occasioned or sustained by reason of the improper unskilful or unmining-like working or using thereof such satisfaction or compensation to be ascertained in case the parties disagree by arbitration in manner hereinafter provided And it is hereby expressly declared that no deficiency in the quantity of ore raised in any year in which the lessors their heirs, etc. may re-enter under this present proviso shall for the purpose of estimating the tonnage rent payable be made up in any sub-

Pp. 302, 303.

sequent year or years Provided always and it is hereby agreed and declared that the lessees their executors, etc. may at the end of the first fifth tenth or fifteenth years of the said term determine the same by giving not less than one year's previous notice in writing of their intention to the lessors their heirs, etc. and on paying the several rents and royalties hereby reserved and performing and observing the several covenants and agreements by the lessees herein contained up to the day of the

Pp. 234, 278, 310.

said term being so determined Provided always and these presents are upon this express condition that if and whenever any part of the said several rents or royalties shall be in arrear for thirty days whether the same shall have been legally demanded or not or if and whenever the lessees their executors, etc. or any of them shall make or return any fraudulent or false accounts under the covenants hereinbefore contained or if and whenever there shall be a breach of any of the covenants and agreements by the lessees herein contained the lessors their heirs, etc. may re-enter upon any part of the said mines, etc. in the name of the whole and thereupon the said term of years shall absolutely determine without prejudice nevertheless to the recovery of any rent or money then due or payable or to any right of distress action or suit that may have arisen under these presents prior to such re-entry or to the liability of the lessees their executors, etc. to perform and observe and to the right of the lessors their heirs, etc. to enforce the performance of every or any covenant or stipulation herein contained and which ought to be performed or observed by the lessees their executors, etc. after the expiration of the said term in case the same had then

Pp. 277, 281, 311, 323.

expired by effluxion of time And the lessors hereby covenant with the lessees that they paying and delivering the said rents royalties and renders hereby respectively reserved and performing and observing the several covenants and agreements by the lessees herein contained may peaceably hold and enjoy the said premises

during the said term without any interruption or disturbance by the lessors or their heirs, etc. PROVIDED ALWAYS and it is hereby agreed and declared that if any dispute question difference or controversy shall arise between the said parties to these presents or their respective heirs executors administrators or assigns touching these presents or any clause matter or thing herein contained or the construction hereof or the rents or sums of money payable under these presents or the working of the said mines or any compensation or satisfaction to be paid or made or other thing to be done under the covenants and agreements herein contained or any matter in any way connected with these presents or the operation hereof or the rights duties or liabilities of either party in connection with the premises then and in every or any such case the matter in difference including any matter hereinbefore agreed to be referred to arbitration shall be referred to two arbitrators or their umpire pursuant to and so as with regard to the mode and consequences of the reference and in all other respects to conform to the provisions in that behalf contained in the Arbitration Act 1889. IN WITNESS, etc.

Pp. 442 *et seq.*

The FIRST SCHEDULE above referred to.

The SECOND SCHEDULE above referred to.

No. 3.—Lease of Three Mines of Coal in accordance with prior Conditions of Letting [Lancashire District].

THIS INDENTURE, etc. BETWEEN A. B. etc. (*hereinafter called the lessor*) of the one part and C. D. and E. F. etc. (*hereinafter called the lessees*) of the other part WITNESSETH that in consideration, etc. the lessor hereby grants and demises unto the said lessees all such parts and portions of the mines beds or seams of coal respectively called the Yard Mine Four Foot Mine and Five Foot Mines as shall be found lying and being on the side of a certain fault which so far as ascertained is supposed to extend or lie as regards the 1st and 2nd of the said mines in or about the direction and upon or near to the site shown by the line marked. in the plan drawn in the margin hereof and as regards the 3rd of the said mines in or about the direction and upon or near to the site shown by the line marked on the same plan or wheresoever the same fault shall be found lying with regard to any of the said mines respectively within and under all and singular the lands, etc. belonging to the said A. B. situate in X. in the county of Lancaster and now in

Pp. 273 *et seq.*

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the occupation, etc. containing by estimation, etc. and more particularly delineated in the said plan and thereon edged . [*Full powers to work and win mines.*] But the lessees are not to enter upon or use the surface of the said land and premises hereinbefore described or any part thereof (except as herein authorised) but they are to work get excavate and carry away the same mines respectively by or by means only of underground workings ways roads excavations and shafts or pits in other lands or grounds adjoining unto or communicating with the said hereby demised mines Together also with full power liberty and authority to carry away and convey through and along any excavations and roads which may be made by the said lessees in the said mines hereby demised or any of them the produce of any other adjoining mines of coal of which the said lessees may be the owners or lessees and also with full power and authority for the lessees at their option and others by their or any of their appointment to enter into and upon such part and parts of the aforesaid lands hereinbefore described as are coloured in the aforesaid plan being yards long and yards wide but without using injuring disturbing or otherwise interfering with the remainder or other parts of the said lands not so coloured with or without horses and other beasts of burden carts wains carriages and waggons and (having previously at their own costs and charges and to the satisfaction of the said A. B. his heirs, etc. constructed efficient fences on both sides for the whole length thereof in order effectually to separate the land coloured in the said plan from the adjoining lands and having made suitable and sufficient gates in such fences and convenient approaches to and from such gates from and to the adjoining land for the convenient passing and re-passing of the said A. B. his heirs, etc. and his and their tenants, etc. who shall always be at liberty on foot and on horseback and with or without his or their horses and cattle carts and carriages laden or unladen to pass and re-pass through such gates and either at right angles or diagonally but not longitudinally over and across the land so delineated and coloured as aforesaid) there and thereupon with or without materials implements and utensils to make construct and use a railway tramway or other roadway and passage they the said lessees when any such way or road shall be disused or discontinued making good the land which shall have been broken or disturbed for the purposes aforesaid in accordance with the covenant in that behalf hereinafter contained And also full power and authority to remove cart and carry away through over and along any such railway or other way to be made in pursuance of the power and authority last aforesaid as well all or any mines or seams hereby demised as also any mine or mines

Pp. 274, 360.

Pp. 434, 435.

Pp. 366 *et seq.*

of coal which may be worked or gotten by the said lessees from any lands adjoining or adjacent to or in connection with the said mines hereby demised and also any plant materials articles and things whatsoever of them the said lessees [*Exception of all other mines to lessor and incidental rights of working same, including a power to sink through the demised mines and to carry a railway or other road across lessees' tramway, doing as little injury to the latter as possible, and paying* [*or not*] *compensation for such injury* (*if any*). *Exception of parts of demised mines for barriers and supports of pits, etc.*] TO HAVE AND TO HOLD [*the premises subject to the exceptions and subject also to all if any previous and existing leases, etc.*] unto the said lessees for the term of years to be computed from the day of last past determinable nevertheless as hereinafter mentioned YIELDING AND PAYING therefor in respect of the several mines liberties and premises hereby demised (other than and except the liberty to enter upon the land coloured on the said plan) the fixed or certain yearly rent of £ sterling (clear of all deductions except landlord's property tax) by two equal half-yearly payments on the day of and day of in every year the first of such half-yearly payments to be made on the day of next AND ALSO YIELDING AND PAYING yearly and every year until the whole of the said mines beds and seams of coal hereby demised shall have been paid for by half-yearly payments on the days fixed as the days of payment of the said yearly rent certain as aforesaid for and in respect of the quantity of coal to be from time to time gotten out of each or any of the said hereby demised mines in each or any half-year of the said term hereby granted and further and additional rent or sum of money after the rate of £ for every Cheshire acre thereof of the thickness of one foot and so in proportion for any greater or less quantity than an acre and greater or less thickness than a foot of each of the said mines AND ALSO YIELDING AND PAYING on the day of the full amount or value of the quantity of coal hereby demised which shall then remain ungotton and not then have been actually paid for under the reservation hereinbefore contained such amount or value to be estimated at or after the rate or price per foot per acre aforesaid AND ALSO YIELDING AND PAYING for and in respect of the said land delineated and coloured in the aforesaid plan in case the same or any part thereof shall be entered upon or used by the said lessees or either of them in pursuance of the power or authority hereby granted the further and additional yearly rents or sums following viz. a yearly rent or sum of £ and also a yearly rent or sum to be computed after the rate of £ for every Cheshire

Pp. 253, 275.

Pp. 276, 287.

Pp. 276, 288, 291 *et seq.*

Pp. 276, 293.

App. (C.)

acre and so in proportion for any greater or less quantity than an acre for and in respect of the land delineated and coloured in the said plan or any part thereof which in pursuance of the power and authority hereinbefore contained shall be entered upon or used for the purpose of or in connection with any such railway tramway or other road way or passage as aforesaid (clear of all deductions except landlord's property tax) by two equal half-yearly payments on the days fixed as the days of payment of the said fixed and certain rent hereinbefore reserved the first of such half-yearly payments of the same several rents lastly hereinbefore reserved to become due and be made on such of the said half-yearly days as shall first and next happen after such entry or user shall take place and the same to continue payable by such half-yearly payments until the delivery up of the same land restored in accordance with the covenant in that behalf hereinafter contained PROVIDED nevertheless that in case the said acreage rent shall in any one year during the same term exceed the said certain or fixed rent of £ reserved and for the time being payable as aforesaid then and so long as it shall so happen the same certain or fixed rent shall not be payable and the said lessees shall be discharged from the payment thereof BUT in case the said acreage rent shall happen to be less than the said certain rent then and so long as it shall so happen and continue the said certain rent and not the said acreage rent shall be payable as aforesaid.

Pp. 237, 290.

[*Power to make up short workings of one year in any subsequent year.*]

[*Provision for yearly measurements of coal, distinguishing defaults and fault-depreciations.*]

Pp. 293. 297. [*Power of distress (extending to the adjacent mines also).*]

Lessees' covenants :—

Pp. 277, 286 *et seq.*

1. To pay rents including rent for part (if any) of surface used;
2. To pay taxes, etc. ;
3. To maintain fences, etc.;
4. To restore surface used for railway restoring also all (if any) breaks in fences ;
5. To pay for surface damage (if any) ;
6. And also shall not nor will during the term hereby granted work excavate or remove or permit or suffer to be worked excavated or removed for any purpose whatsoever a greater quantity or thickness of the earth materials rubbish or strata lying or being under

the lands of the said lessor hereinbefore described or any part or parts thereof than such portion thereof as with the thickness of each or any of the mines beds or seams of coal hereby demised is or are necessary for working and getting the same mines or any of them according to the usual method of working similar coal-mines;

7. Not to assign or underlet (unless to a partner) without consent;

8. To work out or at least pay for the whole of the coal in mines;

9. To keep true levels, and generally to work in a skilful manner;

10. And shall not nor will get or work one or more of the mines hereby demised to the detriment loss or injury of the other or others of them but shall and will in working the same mines and each and every of them so work the same respectively as not to raise or get the coal from or out of any lower mine or mines in advance of that in an higher mine or mines so as by dislocation or otherwise to prejudice damage or render more difficult or costly the working or getting of any such higher mine or mines; Pp. 229, 303 *et seq.*

11. To pay for portion of mines rendered unworkable through improper workings;

12. To keep working plans, etc.;

13. To permit lessor, etc. to inspect and for that purpose to descend, etc. taking a workman or workmen to assist.

[*Lessor's covenant for quiet enjoyment. Power to re-enter and determine demise in specified events.*]

PROVIDED ALSO and it is hereby expressly declared and agreed that when and so soon as before the expiration by effluxion of time of the term hereby granted the whole of the said hereby demised mines shall have been paid for by the said lessees at and after the respective rates and prices aforesaid then and in such case all future payments for or in respect of the same mines shall cease; and the said lessees shall be at liberty within the then residue of the hereby granted term to get remove and convert to their own use so much of the hereby demised mines or any of them as they shall then have paid for and shall not have then actually gotten. Pp. 288, 291 *et seq.*

[*Arbitration clause*].

IN WITNESS, etc.

App. (C.)

No. 4.—Lease of Mines of Coal [General Form].

Pp. 273 *et seq.* This indenture made the day of 19 Between [*lessor*] of the one part and [*lessees*] of the other part Whereas by an indenture of settlement dated the day of 19 and made between, etc. all the lands and hereditaments hereinafter described with the appurtenances were (together with other hereditaments) conveyed and assured to the use of the said [*lessor*] and his assigns for his life and after his decease to and for the several other uses and purposes therein particularly expressed and in the said indenture was contained a power enabling the said [*lessor*] and his assigns during his life to limit and appoint by way of demise or lease all and every or any of the mines [*recite the power totidem verbis*] And whereas the said [*lessor*] has agreed to grant a lease of the mines of coal in the lands and hereditaments hereinafter described to the said [*lessees*] in the manner hereinafter expressed And whereas the expression "*the lessor*" is intended to comprise as well the said [*lessor*] and his assigns as other the person or persons entitled after his decease for the time being to the rents and profits of the lands and hereditaments hereinafter described by virtue of the said recited indenture of settlement and the expression "*the lessees*" is intended to comprise as well the said [*lessees*] and the survivors and survivor of them as their or his assigns and the executors or administrators of such survivor unless the context shall be repugnant to such construction Now this indenture witnesseth that in pursuance of the said agreement and in consideration of the rents covenants and provisoes hereinafter reserved and contained and on the part of the lessees to be payed observed and
Pp. 231 *et seq.* performed He the [*lessor*] in pursuance and execution of the power or authority to him for this purpose limited or reserved as aforesaid and of all other powers and authorities in anywise enabling him in this behalf doth by these presents appoint grant and demise unto the said [*lessees*] all those mines seams or strata of coal as well opened as not opened called or known by the names of the Six Feet Coal the Yard Coal the Five Feet Coal the Seven Feet Coal and the Two Feet Coal lying or being in or under all or any of the inclosed lands situate within the manor of A. and which lands are hereinafter for the sake of distinction called lands A. And also all those mines seams or strata of coal as well opened as not opened respectively lying and being within and under all [*describe the*
Pp. 274, 360. *lands by special or general description*] Together with full and free liberty (subject as hereinafter is mentioned) for the lessees to search for, win and work the said mines and premises hereby

demised according to the most approved practice for the time being adopted in similar mines in the district and either with or without support to the surface except as hereinafter mentioned and to carry away and dispose of all the coals which may be so found and produced [and the coke made therefrom as hereinafter is mentioned] AND for the purposes aforesaid to appropriate repair and make use of all such pits shafts levels drifts and other works as are now open or available and to dig sink drive make repair and use all such pits shafts levels drifts and other works which may be necessary or proper AND ALSO to appropriate and use such parts of the said lands either underground or on the surface which may be reasonably required for depositing and keeping the said produce and for heaping the earth soil and other refuse substances procured therewith AND ALSO to use and enjoy all the houses cottages sheds and other buildings heretofore occupied with the said mines hereby demised and to erect and build remove and again rebuild on any part of the said land any houses cottages sheds buildings engines machinery and other works AND to do all other things which shall from time to time be necessary or convenient for the effectual working of the said mines hereby demised [AND to erect and make upon any part of the said lands coloured in the said plan any furnaces ovens and other works for the conversion of the coal hereby demised into coke] AND ALSO to use or construct and use upon any part of the said lands all such railroads and other roads or ways which may be proper or convenient for the enjoyment of the said mines and for the sale and delivery of the produce thereof and for the carriage of materials thereto AND ALSO to use and make all such watercourses airgates or passages which may be proper for supplying any part of the said mines and works with pure air and water or for freeing the same from foul or unwholesome air and water and to erect all adequate machinery and apparatus for such purposes AND ALSO for any of the purposes of this demise but not otherwise to work take and carry away any stone clay or earth in or under the said lands and to make bricks tiles and other materials from such clay or earth and together with all such other usual and proper easements rights privileges and immunities as may be necessary or convenient for any of the purposes of these presents PROVIDED ALWAYS that previously to entering upon any part of the said lands for any of the aforesaid purposes the lessees shall give one calendar month's notice thereof to the lessor or his agent and also to the occupier for the time being of the lands so required PROVIDED ALSO that the tenants for the time being of the said lands shall be employed in winning and working such stone as shall be required in

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Pp. 231, 304, 363.

preference to any other persons at such rates or prices as are usually paid in the neighbourhood And together with full and free liberty for the lessees or lessee for the time being to make drive and use any passages or drifts by way of outstroke or instroke not exceeding three in the whole of such passages or drifts from forth through into or out of the barrier hereinafter covenanted to be left unworked for the purpose of working and carrying away any coal or other minerals lying or being within or under any adjoining lands and of working and carrying away the coal hereby demised through or over any such adjoining lands Provided that each such drift or passage shall not exceed six feet in width

Pp. 253, 275.

Excepting and reserving out of this demise unto the lessor the right and liberty to have use and enjoy and to grant or demise to any other persons full and free way-leave or right of way and passage with waggons carts and any other carriages from or to any other mines whatsoever situate in the said lands or elsewhere or from or to any other places whatsoever and for any purposes whatsoever in through over across under and along all and every or any of the waggon-ways or railways and other roads or ways now or hereafter to be made for any of the purposes of these presents And also full power and authority to use and employ for the purpose of this exception or reservation all the fixed machinery rails and articles and things belonging to the mines and premises hereby demised Provided always that the lessor and other persons exercising any such rights shall not substantially obstruct or prejudice the lessees in the enjoyment of the mines and premises hereby demised and shall also pay to the lessees reasonable and proportionable compensation for and towards the making supporting replacing and repairing of the said waggon-ways railways and other roads or ways machinery rails articles and things so used or enjoyed in common And also excepting and reserving out of this demise to the lessor full and free liberty and power to stop and hinder any other persons who are not authorised for that purpose from using the same waggon-ways railways and other roads or ways And also excepting and reserving out of this demise unto the lessor and his tenants full and free liberty to lead or carry manure lime or compost for the use of the said lands hereinbefore described and also hay corn straw and other produce thereof with horses carts and other carriages through or over any parts of the said lands and over along or across any waggon-ways railways and other roads or ways to be made or used by virtue of these presents without paying any compensation for the same Provided always that as little interruption as possible be thereby given to the lessees in the prosecution of the mines and premises hereby

demised) (*): To HAVE AND TO HOLD the said mines seams strata and all and singular the rights liberties powers privileges and premises hereby appointed and demised (and excepting as herein- APP. (C.) Pp. 275.

(*) *Variation.*—EXCEPTING, etc. full and free right power and authority unto and for the lessor to have and enjoy or to grant and demise any way-leave or right of passage to any person or persons whomsoever for any purpose whatsoever [except the conveyance of coals] in through over and along the said lands or any part thereof with liberty to make lay and place any railways waggon-ways or cart or other ways across and therewith to intersect either upon the level or by passing over or under the same the present or future railways and other ways hereby authorised to be used and made and to pass and repass in through over and along the railways or other ways and crossings hereafter to be made by virtue of this present exception or reservation and all such existing intersecting railways and other ways and crossings with horses and other animals engines both stationary and locomotive ropes and other machinery carts wains waggons and all other carriages whatsoever laden or unladen but so as not to prejudice or damage the said present and future railways and other ways hereby authorised to be used or made otherwise than by crossing or intersecting the same and so as in all such crossings thereof as little hindrance or interruption as reasonably or conveniently may be shall be given to the lessees or lessee their or his agents servants or workmen and so as the places of and the works necessary for such crossings or intersections both future and present be respectively made and repaired and kept in good repair by and at the expense of the lessor his grantees or lessees AND ALSO excepting, etc. unto the lessor and the occupiers for the time being of the said lands and their respective tenants agents and servants for the more convenient occupation management and cultivation of their respective messuages farms and lands (but not for any colliery or other purposes) full and free power and liberty to cross over the said present and future railways and other ways hereby authorised to be used and made by the lessees or lessee on foot or on horse-back and with or without horses or other animals carts waggons or other carriages laden or unladen so that as little hindrance or interruption as reasonably or conveniently may be shall be thereby given to the lessees or lessee and their or his agents servants or workmen and so as the places of and works necessary for such crossings as last aforesaid both present and future be respectively made and repaired and kept in good repair by and at the expense of the person or persons so using the same.

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before is expressed to be excepted) unto the said [*lessees*] from the 1st day of November now last past for and during the full term of
Pp. 276, 287. forty-two years RENDERING and paying therefor unto the lessor yearly and every year during the said term the certain yearly rent or sum of £ of lawful money of Great Britain whether the said coal mines hereby demised shall be worked or not to be paid by two equal half-yearly payments in every year that is to say on the first day of November and the first day of May in every year the first payment thereof to be considered to have become due on the first day of November now last past FOR and in respect of which said certain yearly rent of £ it shall be lawful for the lessees to win work and carry away from forth and out of the mines hereby demised such a quantity of coals as shall at the rate per ten hereinafter nextly mentioned produce the sum of £ AND if in any year or years they shall work less than such quantity then they may work and carry away the deficiency in any succeeding year or years of the said term without paying any tentale or other rents other than the said certain rent PROVIDED ALWAYS that they shall not work or carry away in any year in respect of the said certain rent more than such quantity as aforesaid together with the deficiency (if any) of any preceding year or years AND ALSO RENDERING and paying therefor unto the lessor yearly and every year during the said term in respect of all coals wrought and brought to bank from the said mines hereby demised over and above such quantity as may be so worked in respect of such certain rent as aforesaid the rent or sum of for every ten of such coals to be paid on the first day of November in every year PROVIDED ALWAYS that for the purposes of these presents a ten of coals shall be considered as consisting of eighteen chaldrons and one-third of a chaldron of fifty-three hundredweight each PROVIDED ALSO that all the rents hereinbefore reserved shall in all cases be calculated upon the coals actually drawn to bank AND that a deduction of one-seventh part shall be made from all such coals in respect of the consumption required in carrying on the said mines and premises hereby demised which shall not be liable to any rent whatsoever PROVIDED ALSO that the lessees shall not leave underground a greater quantity of the coals actually worked than eight parts per centum of the whole AND in case more than that quantity shall be so left the surplus thereof shall be comprised in the quantity of coals liable to such rents as aforesaid and shall become so liable in like manner as if
Pp. 231, 304, 363. it had been brought to bank AND ALSO RENDERING and paying unto the lessor yearly and every year during the said term the sum of one shilling for and in respect of all the coals which shall be carried away by the lessees from the said mines and premises hereby demised through or by means of any of the drifts or

passages hereby authorised to be so used by way of outstroke or instroke as aforesaid AND ALSO RENDERING and paying to the lessor the sum of for every ten of coals which shall be brought drawn or carried away by the lessees from any adjoining mines by means of any such drifts or passages to be so used by way of outstroke or instroke as aforesaid into or through the said lands hereinbefore described or the said mines and premises hereby demised and by means of the shafts or pits and railways or other roads or ways so authorised to be used as aforesaid (*) to be paid on the first day of November in every year in which the same shall become due ALL which said several rents and sums of money hereby reserved and made payable shall be paid without any deduction or abatement whatsoever for or on account of any parliamentary parochial or other taxes rates assessments outgoings or impositions whatsoever (except the income tax payable by landlords and the land tax) AND the said [*lessees*] do and each of them doth by these presents covenant and agree with the lessor in manner following that is to say THAT they the lessees shall and will well and truly pay or cause to be paid to the lessor for the time being the aforesaid several rents and sums of money hereby respectively reserved and

Pp. 277, 286 *et seq.*

(*) *Variations.*—RENDERING, etc. when the average market price for any such coals shall not exceed during any year of the said term the sum of per ton then the rent or sum of for every ton of such coals for such year and when such average market price shall exceed the sum of then the rent or sum of for every such ton for such year.

RENDERING, etc. the sum of for and in respect of all the round coals brought to bank from the said mines over and above etc. the rent or sum of for every ton of twenty hundredweight imperial measure of such coals and the sum of for and in respect of all the small coals so brought to bank over and above, etc. the rent or sum of for every such ton of such coals AND the term "round coal" shall be considered as meaning all coals which shall pass over a screen the bars of which are not more than three-eights of an inch asunder AND the term "small coals" as meaning all coals which shall pass through the like screen.

RENDERING, etc. a rent or sum of money equal to one-twelfth part or share of the gross amount of all the monies arising from the sale of such coals in every year AND if the said mines shall in any year fail in producing tons of coal then such an additional rent or sum as together with the last-mentioned rent or sum shall amount to the sum of £ sterling for every such year.

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made payable at the times and in the manner hereinbefore respectively mentioned And also shall and will at all times during the said term well and truly pay or cause to be paid all taxes rates charges assessments tithes or commutation rent in respect thereof and outgoings or impositions whatsoever now or hereafter to be taxed charged assessed or imposed upon or in respect of the premises hereby granted and demised (except the income tax payable by landlords and the land tax) And also shall and will at the expiration of one calendar month after the end of every year of the said term of forty-two years well and truly pay or cause to be paid to the lessor for the time being for the use of himself or themselves or his or their tenant or tenants full and reasonable satisfaction for the injuries or spoil which during each such preceding year shall have been committed to or upon the said lands hereinbefore described or upon any crops buildings or any other property thereon or therein by the prosecution of the mines hereby demised or by the enjoyment of any of the liberties or privileges hereby granted And also that it shall be lawful for the lessor from time to time to distrain the coals fire and other engines waggons wains machinery and other the goods articles and things of the lessees or lessee in under or upon any part of the said lands for or in respect of any rents or sums hereby reserved in like manner as landlords may distrain for arrear of rents And also shall and will at all times during the said term keep or cause to be kept at the counting-house or office to be situate in some part of the said lands correct and intelligible books of account upon some approved and usual plan and principle in which books entries shall be made of the quantity and description of all coals [and coke] to be so raised produced and brought to bank as well from the mines and premises hereby demised as from any adjoining mines of the lessees or lessee by means of outstroke or instroke as aforesaid and distinguishing between the produce of the mines and premises hereby demised and the produce of such other adjoining mines And also shall and will on each and every of the days hereinbefore mentioned for the payment of the contingent rents and sums of money hereby respectively reserved make out and deliver or cause to be made out and delivered to the lessor or his agents a proper and correct abstract or copy of the said books of account for the then last preceding year And also shall and will from time to time during the said term cause to be made true correct and intelligible plans the sections as well of the said mines hereby demised as of any such adjoining mines to be so worked as aforesaid and of the progress and actual state of the works in the said mines respectively And also that all coal waggons or other carriages tubs or boxes used by the lessees within the district shall be of the same

Pp. 289, 320.

known size and capacity and shall not be altered unless two calendar months' notice in writing of such intended alteration shall be given to the lessor or his agent and that such alteration shall be made only at the beginning of a year of the said term AND ALSO that the lessor or his agent may at any time during the said term measure all or any of the waggons carriages tubs and boxes and if upon any such measuring the said waggons carriages tubs or boxes or any of them shall be found to contain more than the acknowledged and specified quantity then the lessor or his agent may stop such of them as carry over-measure, until the lessees or lessee shall reduce the same to the uniform and proper size and capacity AND all such waggons carriages tubs or boxes so carrying such over-measure shall be considered to have carried the same for three calendar months next preceding such measuring as aforesaid and be accounted for accordingly unless any such measuring shall have been made within the space of three calendar months and then only from the time of such last previous measuring AND ALSO shall and will permit the lessor and his agents to enter into and upon and have free access to any counting-houses or offices for the purpose of examining the said several books of account plans and sections and the sections of strata and other records relating to the searching for or winning any coal or other mines in the said lands and in any adjoining lands and to take copies thereof and to make extracts therefrom respectively AND ALSO shall and will if required by notice in writing from the lessor or his agent in a proper and workmanlike manner proceed to sink or dig within one calendar month after the receipt of such notice one or more pit or pits in the said lands down towards the bed of coal called the Two Feet Coal and shall afterwards continue such work or works regularly and properly till the said last-mentioned coal shall be effectually obtained and won AND ALSO shall and will at all times during the said term work and carry on as well the said mines hereby demised as such adjoining mines to be worked as aforesaid properly and according to the most approved practice from time to time adopted in the winning and working of coal mines in the same district and without any unnecessary waste of the coal hereby demised and with as little damage as possible to the surface of the said lands hereinbefore described or to the messuages buildings walls fences and other property thereon AND ALSO shall not or will injure or endanger the houses walls and other erections now or hereafter being on any part of the same lands by undermining the foundations thereof or working the said mines hereby demised or such adjoining mines as aforesaid in a negligent or improper manner AND ALSO shall not nor will make or sink any pit or make railways or other ways or otherwise disturb or interfere with the surface of the said lands

Pp. 267, 289, 445.

Pp. 304, 308, 309, 336, 447.

Pp. 229, 303 *et seq.*

Pp. 231, 399.

App. (C.) hereinbefore described within the space of 150 yards from the farm-houses or any other buildings thereon without the previous and express consent in writing for any such purpose from the lessor And also shall and will leave unworked underneath or near to such farm-houses and other buildings as aforesaid so much of the strata coal and other minerals there situate as the
Pp. 425, 448. lessor for the time being or his agent shall direct And also shall and will in working the mines hereby demised keep and leave unworked in every seam of coal and in every vein or bed of other mineral a barrier of whole coal or other mineral of at least twenty yards in breadth or thickness in every part next to or adjoining any coal or other mines or seams whatsoever which are not the property of the said lessor and also shall not nor will break or otherwise diminish any such barriers without the previous consent in writing of the lessor except by way of such outstroke or instroke as aforesaid And also shall not nor will cause to be made in the whole more than three such drifts or passages by way of outstroke and instroke in pursuance of the powers aforesaid and that all such drifts and passages shall not exceed six feet in width And also shall and will upon the expiration or sooner determination of the said term provide sufficient frame dams for all such drifts and passages so that the same may be effectually stopped and secured except in all such places as the said barrier shall have been removed with such consent in writing as aforesaid And also shall not nor will leave underground a greater quantity of the coals actually worked than eight parts per centum of the whole And also shall not nor will at any time during the said term permit any coals minerals materials goods or merchandise other than are so allowed under the rights and powers hereby demised as aforesaid to be carried past over or across or along any railways or other ways or roads to be used by the lessees by virtue of these presents without an agreement in writing between them and the lessor first had and obtained for any such purpose And also shall and will cause to be properly laid aside in heaps all the earth and refuse which shall be dug up in working of the said mines hereby demised or such adjoining mines And also shall and will secure and keep open with timber or by other good effectual and durable means all pits and shafts now sunk or made or hereafter to be sunk or made in the said lands hereinbefore described and make and maintain sufficient walls or fences round every such pit and shaft And also shall and will at all times during the said term, keep the said mines hereby demised well and sufficiently drained from water and
Pp. 454, 456. supplied with fresh air And also shall and will well and sufficiently support and secure the said mines and the waygates watergates and passages thereof with sufficient pillars of coal or

strong timber or brick or stone arching or by other good effectual or durable means And also shall not nor will at any time during the said term commit neglect or omit any act deed matter or thing whatsoever whereby the said mines or works shall or may be in any wise endangered injured or damaged And also shall and will when and so often as any pit or shaft now or hereafter to be sunk or made in the said lands shall during the said term become useless or unnecessary in consequence of any mine or seam becoming exhausted or from the making of some other pit or shaft in another place or from any other cause when thereunto required by the lessor or his agent but in no case without his or their consent in writing cause to be filled up and levelled such pit or shaft And also shall and will at the request of the lessor or his agent in writing at the end or sooner determination of the said term cause to be restored to their original or natural condition all such parts of the said lands as shall have been so appropriated for any of the purposes of these presents as aforesaid and which shall not be used or occupied by the lessees or shall at the option of the lessees well and truly pay to the lessor the full amount in money of the value of the fee simple of the parts so appropriated and so ceased to be used or occupied as aforesaid such lands still remaining the property of the lessor And also shall and will at all reasonable times during the said term well and effectually fence off all such parts of the said lands as shall be so appropriated and used or occupied for the time being as aforesaid with good substantial posts and rails and convenient and sufficient gates and maintain all such fences in good and sufficient repair And also shall and will at all reasonable times during the said term permit the lessor and his agents workmen and servants to go down any pits or shafts now or hereafter to be sunk or made in the said lands or in any such adjoining mines as aforesaid and to enter into and examine as well the mines and works hereby demised as such adjoining mines and to make surveys and plans thereof respectively without any denial interruption or hindrance whatsoever and for such purposes shall and will permit the lessor and his agents workmen and servants to use all the machinery works and means employed in the said mines respectively from time to time and with proper workmen and servants effectually assist such person or persons as aforesaid in going down any such pits and shafts and in entering into and examining the said mines and works respectively in manner aforesaid and in returning to the surface And also shall not nor will assign demise or otherwise dispose of the said mines and premises hereby granted and demised or any part thereof for the said term or any part thereof without the previous consent in writing of the lessor for the time being And also shall and will upon breach of any of the

Pp. 262, 336, 429, 430.

Pp. 434, 435.

Pp. 267, 289, 445.

Pp. 277, 311, 330.

App. (C.)

covenants provisoes and agreements herein contained if required thereto by the lessor well and truly convey and surrender to him by deed or writing the said mines and premises hereby demised for the remainder of the said term hereby granted thereof as aforesaid And also shall and will at the end or sooner determination of the said term yield and deliver up to the lessor in good order repair and condition and fit for the future working or enjoyment thereof the said mines and premises hereby demised and all buildings erections pits shafts watercourses levels ways roads waygates and watergates [furnaces and ovens] for the time being used and employed in or about the working of the said mines [and the manufacture of the said coke] and the disposal of the coals [and coke] to be so produced thereout and all and singular the movable machinery works articles and things which the lessor shall then elect to purchase at a price to be determined in case of disagreement by arbitration in the manner hereinafter mentioned but so that the same be valued as the stock of a current going colliery Provided always and it is hereby further agreed that the lessor shall not be at liberty to avail himself of his election either to purchase all or any of the machinery works articles and things hereinbefore mentioned unless he or his agent shall give notice in writing to the lessees at least six calendar months previous to the end or sooner determination of the said term hereby granted of his electing to purchase the same specifying in such notice the several machinery articles and things intended to be so purchased and shall not be at liberty to purchase any part or parts but the whole of any individual machine article or thing And if the lessor shall not by giving such notice as aforesaid avail himself of his election to purchase all or any of such machinery works and things then the lessees shall be at liberty at any time before the expiration of six calendar months after the determination of the said term to sell either by public auction or private contract on the said lands the machinery works articles and things which shall be legally removable by them and shall not be elected to be purchased as aforesaid and within the last-mentioned period to take and carry away the same from the said lands on repairing or making good the damage or injury which may be done to the said lands by the removal of such machinery works articles and things Provided always that the lessees shall not be at liberty to remove the timber or materials necessary for keeping open any parts of the said mines and proper for the future working thereof nor any of the gates posts or fences connected with any waggon-ways or other roads or ways to be used by virtue of these presents but all such articles and things shall become the property of the lessor without any compensation being made for the same And also within the same

Pp. 264, 305, 315, 321, 328.

Pp. 263—265.

period to take and carry away all coals and other produce of the said mines hereby demised and any such adjoining mines worked as aforesaid PROVIDED ALWAYS that all such produce shall not exceed the usual amount of two months' sale and shall be so heaped or placed together and so removed as to occasion no interruption or inconvenience to any persons carrying on the said mines hereby demised PROVIDED ALSO and it is hereby agreed Pp. 302, 303. that in case the lessees shall be desirous at the end of any year of the said term of forty-two years to abandon and yield up all the said mines and premises hereby demised and of such their desire shall give notice in writing to the lessor or leave such notice at his usual or last known place of abode in England six calendar months or more before the period of such proposed abandonment then this present indenture and the term and estate hereby granted or demised and every clause matter and thing herein contained shall at such last-mentioned period cease determine and become absolutely void to all intents and purposes whatsoever except in respect of any previous breach or nonperformance of all or any of the covenants and agreements hereinbefore contained on the part of the lessees and except in respect of the covenants to be performed by them after the expiration or sooner determination of the said term PROVIDED ALSO and it is hereby expressly agreed and Pp. 234, 278, 310. declared that if at any time during the continuance of the demise the several yearly or other rents or sums of money hereby reserved and made payable or any of them or any part thereof shall be in arrear or unpaid for the space of three calendar months after any of the days or times hereby appointed for payment thereof respectively or in case the lessees shall assign demise or otherwise dispose of the said mines and premises or any part thereof contrary to the covenant in that behalf hereinbefore contained it shall be lawful for the lessor or his agent to enter forthwith into and upon the mines and premises hereby demised and the same to repossess and enjoy as fully and effectually as if these presents had not been made and executed AND thereupon the said term hereby granted shall cease and determine without prejudice to the rights and remedies of the lessor against the lessees in respect of any of the covenants provisoes or agreements herein contained which may then be broken or unperformed or which are to be performed or observed at or after the expiration or sooner determination of the said term and on such determination by re-entry a proportionate part of the said certain rent and the whole of the tentale rents shall immediately accrue and be recoverable in respect of that part of the current half-year or year which may have elapsed and of the coals worked and carried away during the same period [*Lessor's covenants for quiet enjoyment and for further assurance.*] AND ALSO that the lessors or his heirs Pp. 248 *et seq.*

App. (C.) shall and will at any time within three months after the expiration by effluxion of time of the said term hereby granted as aforesaid at the request costs and charges of the lessees by indorsement on these presents and the counterpart thereof or by some separate deed or writing whereof there shall be a counterpart executed by them appoint and grant all and singular the mines and premises hereby demised unto the lessees for and during the full further term of forty-two years to commence and be computed from the day of the expiration by effluxion of time of the said term hereby granted as aforesaid and thenceforth next ensuing at under and subject to such and the like rents reservations provisoes and agreements as are herein reserved expressed and contained. [*Arbitration clause.*] In witness, etc.

No. 5.—Lease of Coal and Iron Mines and Fire-Clay (by means of Schedule) [Northumberland District].

Pp. 273 *et seq.* This indenture, etc. Between A. B. etc. of the one part, and C. D. and E. F. etc. of the other part Witnesseth that in consideration of the rents hereinafter reserved and the covenants hereinafter on the lessees' part contained the said A. B. in exercise of the power, etc. and by virtue of all estates, etc. doth hereby appoint and also grant and demise unto the said C. D. and E. F. their executors administrators and assigns All and
P. 273. singular those the mines beds veins and seams of coal ironstone and fire-clay mentioned and described in the *first* part of the schedule hereunder written Together with the liberties powers
P. 274. and privileges (to be exercised in connection with the said mines and premises) which are mentioned and specified in the *second* part of the schedule subject to the restrictions and conditions (as to the exercise and enjoyment of the same liberties powers and privileges) which are specified in the *third* part of the said schedule (except and reserved out of this demise unto the said
P. 275. A. B. and other the person or persons for the time being entitled to the mines and premises hereby demised in reversion expectant on this lease the liberties powers and privileges mentioned and specified in the *fourth* part of the said schedule) To hold the mines and premises hereby demised or expressed to be unto
P. 275. the said C. D. and E. F. their executors administrators and assigns from the day of for the term of forty years thence next ensuing Yielding and paying to the said A. B. or other the person or persons for the time being entitled as afore-
P. 276. said the several rents and sums of money mentioned and specified in the *fifth* part of the said schedule subject to the provisions (relating to the said rents) expressed in the *sixth* part of

the said schedule AND the said C. D. and E. F. do and each of them doth hereby covenant with the said A. B. and other the person or persons for the time being entitled to the premises hereby demised in reversion expectant on this lease as in the *seventh* part of the said schedule is expressed AND the said A. B. as to his own acts and deeds and so as to bind so far as he can or may his successors in title but without being answerable for the acts and defaults of such successors doth hereby covenant with the said C. D. and E. F. as in the *eighth* part of the said schedule is expressed AND IT IS HEREBY MUTUALLY AGREED AND DECLARED between and by the parties hereto as in the *ninth* part of the said schedule is expressed AND it is declared that the schedule hereunder written shall be deemed part of these presents to be read and construed accordingly and in the construction of the said schedule the expression "the lessor" shall mean and include the said A. B. and other the person or persons for the time being entitled to the premises hereby demised in reversion expectant on this lease and the expression "the lessees" shall mean and include the said C. D. and E. F. and the survivor of them and his or their executors administrators and assigns except where the context may require a different construction. IN WITNESS, etc.

APP. (C.) P. 277.
P. 277, 281, 311, 323.
Pp. 234, 278, 293, 297, 310.

The SCHEDULE above referred to:

PART I.—*The Mines Demised* (*or Parcels*).

PART II.—*The Liberties Granted.*

1. To sink pits, etc.
2. To appropriate land for stacking coal, etc.
3. To convert coal into coke and calcine ironstone and make fire-clay into bricks.
4. To lead and carry away coal, etc.
5. To erect houses, etc.
6. To get stone and common clay for colliery purposes.
7. To get coal and ironstone from adjoining mines by outstroke workings.
8. [*General incidental rights.*]

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PART III.—*Restrictions and Conditions on Exercise of Liberties.*

1. [*Surface operations, appropriation of parts of surface for—how to be made.*]

Pp. 230, 274, 275, 304, 308, 336.

2. The expression "surface operations" above used shall mean and include the sinking of pits and shafts the stacking and heaping of coal and all minerals the erection of houses sheds engines machinery furnaces ovens and other buildings and erections the making and construction of railroads and other roads the digging of stone or clay the burning of clay into bricks and all other works and operations authorised to be carried on upon the surface of the said lands or for the carrying on of which it shall be necessary to use or occupy the surface of any land under the liberties powers and privileges conferred by the second part of this schedule.

3. [*Plan and sanitary arrangements of cottages to be approved by lessor.*]

PART IV.—*Exceptions and Reservations.*

[*Liberty for lessor to use railroads, etc., of lessees and to demise same to others not obstructing lessees.*]

PART V.—*Rents.*

Pp. 276, 287 *et seq.*

1. [*Certain rent in respect of which specified quantity of coal to be raised.*]

2. THE RENT of 12*s.* for every ten of screened coals, and 6*s.* for every ten of small coals (and so in proportion for any less quantity than a ten) which shall be raised or gotten from or out of the said mines and premises over and above the quantity which the lessees are hereinbefore authorised to work and get in respect of the said certain rent.

3. THE RENT of 6*d.* for every ton of ironstone which shall be raised in the raw state from the said mines and premises and so in proportion for any less quantity.

4. THE RENT of 6*d.* for every ton of fireclay which shall be raised in the raw state from the said mines and premises for sale and manufacture (except fireclay used by the lessees in and about the erection alteration and maintenance of buildings for colliery purposes and any other works authorised under the

liberties and powers hereby granted and which fireclay they are hereby authorised to use for such purposes rent free).

5. THE RENT of shillings for every ten of screened coal and shillings for every ten of small coal and for every ton of ironstone and for every ton of fireclay the produce of any adjoining mines which shall be brought to the surface through or by means of the mines hereby demised and the pits and shafts thereof under the liberty in that behalf hereinbefore granted.

ALL which rents 2ndly, 3rdly and 4thly above reserved shall be paid respectively on the day of and on the day of in every year for and in respect of the coal, ironstone and fireclay raised during the then preceding half-year.

6. A YEARLY RENT for and in respect of every acre of land the surface whereof shall be occupied or used by the lessees under the authority of these presents double in amount of the value per acre of the same lands for agricultural purposes at the time when such occupation or use shall commence and so in proportion for any less quantity than an acre the said surface rent to be paid half-yearly on the day of and the day of in every year the first of such payments to be made on such of the said half-yearly days as shall happen next after such occupation or use shall have commenced and the last of such payments to be made on the half-yearly day of payment which shall happen next after such occupation or use shall have ceased and the land shall have been restored and rendered fit for cultivation again or shall have been paid for at the fee simple value as provided in the lessees' covenant in that behalf hereinafter contained AND if any difference of opinion shall arise as to what ought to be considered the occupation or use of the surface of any land for the purpose aforesaid or as to the day on which such occupation or use shall have commenced or as to whether such lands shall have been restored and rendered fit for cultivation or as to the amount of rent payable under this reservation the matter in difference shall be settled by arbitration.

Pp. 274, 275.

7. THE YEARLY RENT of 1*s.* for every footpath over the said lands which shall be used by the lessees or their workmen or any of them in or about the carrying on of the works hereby authorised PROVIDED ALWAYS that this reservation shall not be construed as a permission to the lessees or their workmen to make or use any footpath other than any roads hereinbefore authorised to be made or used without the consent of the lessor.

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PART VI.—*Provisions relating to the said Rents.*

1. [*Rents to be free from deduction.*]

Pp. 288 *et seq.* 2. FOR the purposes of the above reservations a ten of coal shall be considered to contain 440 bolls or 18⅓ Newcastle chaldrons of 53 cwt. each and the term "small coal" shall be considered to mean all coal which shall have passed through a screen the bars of which shall not exceed ⅝ths of an inch asunder and the term "screened coal" shall be considered to mean all coal which shall not pass through such screen.

3. ALL coal used by the lessees for the usual and customary purposes of the colliery and for domestic consumption in the houses and offices of agents and workmen for the time being employed in and about the said mines and premises shall be free from rent.

4. [*Power to lessees to make up short workings.*]

PART VII.—*The Lessees' Covenants.*

1. [*To pay rents, taxes, etc.*]
2. [*Not to assign, etc., without license.*]
3. [*To pay every year compensation for injuries to buildings, crops, etc.*]
4. [*To keep books of account, etc.*]
5. [*To keep plans of workings.*]
6. [*To permit lessor to have access to books of account and plans.*]
7. [*To keep all tubs, etc., of uniform measure.*]
8. [*To permit lessor to gauge tubs, etc.*]
9. [*To work mines according to approved practice in Durham and Northumberland districts.*]
10. [*To secure pits and shafts.*]
11. [*To permit lessor to descend into mines to inspect same.*]
12. [*To deliver up mines, etc., in good working order at end of term.*]
13. [*At end of term to restore lands or pay fee simple value.*]

PART VIII.—*The Lessors' Covenants.*

1. [*For quiet enjoyment by lessees.*]
2. [*Lessees may carry away coal, etc., for six months after end of term.*]

PART IX.—*General Provisions.*

1. [*Power of distress.*]
2. [*Power of re-entry.*]
3. [*Power for lessees to abandon mines on giving twelve calendar months' notice.*]
4. [*Power to lessor to purchase machinery, etc.*]
5. [*Arbitration clause.*]

No. 6.—Lease of Coal and Fire-clay [Cumberland District].

THIS INDENTURE, etc. BETWEEN A. B. etc. (*hereinafter referred to as the said lessor*) of the one part and the X. Y. Company Limited (being a company incorporated under the Companies Acts 1862 to 1898 and carrying on business and having its registered office at C. in the county of D. and which company is hereinafter referred to as "the company") of the other part WITNESSETH that in consideration, etc. the said A. B. (by virtue and in exercise of all estates and powers in this behalf limited to or vested in him) doth hereby demise and lease unto the company all those colliery works shafts engine-houses, etc. called, etc. situate, etc. AND ALSO all those mines beds bands and seams of coal and fire-clay as well opened as unopened lying being or remaining or which shall be found to lie be or remain within or under all the lands grounds or royalties of the lessor situate in the several parishes, etc. in the said county and containing by admeasurement, etc. and commonly known by the names, etc. all which said lands and royalties are delineated, etc. SAVE AND EXCEPT out of these presents so much of the said beds bands and seams of coal and fire-clay respectively hereby demised and leased as will leave a barrier of not less than twenty yards in breadth or thickness in each and every seam against each and every out-boundary of the coal and fire-clay expressed to be hereby demised except only where outstroke and instroke drifts are allowed to be driven under the power for that purpose hereinafter contained such drifts not to exceed three in number in each seam and to be in such situations only as shall be approved of by the said lessor his viewer or agent and no drift

Pp. 273 *et seq.*

Pp. 253, 275.

App. (C.)

to be more than eight feet in breadth And also (if so required by the said lessor his viewer or agent for the time being) so much of the said beds bands and seams of coal and fire-clay as will leave a sufficient barrier against any ascertained fault and a sufficient lier underneath all rivers and becks upon or within the said lands grounds or royalties Together with all such rights liberties powers and authorities as are next hereinafter specified (that is to say) full and free liberty license power and authority from time to time during the term hereinafter limited to sink bore dig drive search for work get and raise the said mines beds band and seams of coal and fire-clay respectively hereby demised and for these purposes from time to time during the said term hereby limited to use and enjoy all such pits shafts drifts grooves tunnels soughs levels trenches sluices way-gates water-gates gutters and other works (if any) as are now existing in upon or under any of the said lands or grounds and which have been heretofore used or employed in working and carrying on the coal mines and beds bands and seams of coal and fire-clay respectively hereby demised and leased And to sink drive carry and make such pits shafts drifts grooves tunnels soughs levels trenches sluices way-gates water-gates gutters and other works in upon or under the said lands and premises And to erect build and construct such steam-engines and other engines gins and other machinery and to use and occupy maintain and amend the same in such manner as shall be necessary or expedient and to use all or any lawful ways and means as well for digging boring driving searching for winning working getting and raising the said mines beds bands and seams of coal and fire-clay hereby demised and leased or for drawing or discharging or carrying away water foul air styth and stench forth from and out of the same and with sufficient ground-room heap-room and pit-room for bringing to bank stacking depositing laying and placing the coals fire-clay earth rubbish and substances which shall from time to time during the said term hereinafter limited proceed from or be dug won wrought gotten or raised out of the same mines beds bands and seams of coal and fire-clay respectively And also with full and sufficient way and passage to and for the said company their agents servants and workmen from time to time during the said term to take lead and carry away with horses carts waggons wains and carriages all the coals and fire-clay earth rubbish and substances to be dug won wrought gotten or raised out of the said mines, etc. And also full and free liberty power and authority to erect build cut form construct set up lay down use and occupy all such houses hovels sheds lodgings buildings erections engines roads railways machines and other machinery con-

Pp. 274, 360.

Pp. 151, 171, 304, 363.

Pp. 151, 230, 274, 304, 336.

Pp. 275, 370.

veniences devices inventions or works whatsoever already in use or hereafter to be invented as shall from time to time during the said term be necessary or expedient for the standing laying and placing of workmen workhouses works and utensils for the working and carrying on of the works of the coal mines beds bands and seams of coal and fire-clay respectively hereby demised and leased and for taking leading and carrying away the said coals and fire-clay earth rubbish and substances AND ALSO to take down destroy fill up or remove any of the houses hovels sheds lodges buildings erections engines roads railways machines and other machinery conveniences inventions or works whatsoever which now are or which during the said term shall be erected built cut formed constructed set up laid down used or occupied and which in the opinion of the viewer or agent for the time being of the said lessor shall have become unnecessary for the working of the said coal mines beds bands and seams of coal and fire-clay respectively or the application or disposal of the coals to be raised thereout AND again to erect build cut form construct set up lay down and place on or in any other parts or part of the said land and premises the said houses hovels, etc. so taken down or removed BUT SO ALWAYS that all workmen's houses and other buildings to be placed or replaced on the surface of the said lands be substantially built of brick or stone and covered with slates and in such convenient positions as shall be approved by the said lessor his viewer or agent for the time being and upon ground which shall have been previously drained by the said company to the satisfaction of the said lessor his viewer or agent and so also that all such houses and buildings be left at the end or determination of the said term hereinafter limited in good and sufficient repair and become the property of the said lessor AND ALSO to dig and get such sand and such other clay and to make and burn the same into bricks or tiles and to get such building stone for building and for making and repairing roads as it shall be necessary for the said company to use in the exercise of the powers and authorities hereinbefore and hereinafter made exerciseable but so only that the said last-mentioned sand clay bricks tiles and stones respectively be used for the purposes last aforesaid or some of them in or upon the said lands and premises or some parts and part thereof and not elsewhere or otherwise and so that the same be not sold AND ALSO to drive or make one or more outstroke or outstrokes instroke or instrokes undercut drift or drifts passage or way from or out of and into any other collieries or coal mines which adjoin the coal mines beds bands and seams of coal and fire-clay hereby demised and leased and which are now or during the said term may be brought by the said company

Pp. 263, *et seq.*

Pp. 241, 304, 363.

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to and into and through the same coal mines, etc. And also to drive or make any drift watercourse aircourse watergate or other work from into or within the coal mines, etc. hereby demised which shall be deemed necessary or proper for the due working and enjoyment of the same or of any such collieries or coal mines adjoining and wrought as aforesaid But so only that such outstroke or instroke drifts through the aforesaid barrier against the out-boundary of the coal and fire-clay hereby demised do not exceed three in number and eight feet each in breadth in each seam and be made only in such situations as shall be approved of by the said lessor his viewer or agent for the time being and be severally closed up by means of proper frame-dams at the end or other sooner determination of the said term hereby limited And by means of the pits shafts adits levels outstrokes instokes undercut drift or drifts passages or ways watercourses aircourses watergates roads ways gins engines houses erections buildings and works hereby authorised to be made or used or any of them to win work and carry away as well the coal and fire-clay respectively to be won and wrought in forth from and out of the said coal mines, etc. hereby demised as also the coal and fire-clay respectively to be found and lawfully gotten in and from any such other collieries or coal mines adjoining and now wrought or during the said term to be wrought by the said company as aforesaid Provided always and it is hereby expressly agreed and declared that if by reason of the exercise of the powers aforesaid or any of them the surface of the lands or grounds over under or in relation to which the same powers are hereby expressed to be made exerciseable or any part thereof or any crops growing or any buildings now standing or being or hereafter to be erected or built theron or any rivers of water streams or becks drains or watercourses thereon shall be injured or prejudicially affected the company shall forthwith pay by way of compensation for the same to the owners and occupiers for the time being of the surface of such lands and grounds respectively or to other the person or persons entitled to such compensation an annual sum nor less than double the annual value of the cultivated lands so injured or prejudicially affected together with reasonable compensation for all crops and fences and buildings injured or destroyed by reason of the exercise of the powers aforesaid or any of them such compensation as between the parties to these presents to be settled by arbitration in manner hereinafter mentioned in case such parties differ about the same And that the said company shall also pay to the said lessor or other the person or persons entitled to receive the same the fee simple value of all land so injured or prejudicially affected as aforesaid which shall not at or

Pp. 286, 315.

before the end of six calendar months after the determination of the said term have been by the said company restored and made fit for cultivation such land nevertheless remaining the property of the said lessor or other the person or persons for the time being entitled to such land in case these presents had not been made EXCEPTING nevertheless and always reserving unto the said lessor full power and authority to win and work and to grant to any person or persons whatsoever liberty to win work and get any minerals or substances within or under the said lands or grounds or any of them (other than and except the coal-mines and beds bands and seams of coal and fire-clay respectively hereby demised and leased) with all necessary and proper way-leaves powers and privileges for winning and working the same so only the said company be not thereby prejudiced in the exercise of the powers and privileges hereby granted or any of them AND excepting also and always reserving unto the said lessor the reasonable use and enjoyment (and full power to grant to any person or persons whatsoever the reasonable use and enjoyment) of any waggon-way railway road or other way made by the company in or upon the said lands and grounds or any part thereof but so as not to interfere with the reasonable use and enjoyment of the same respectively as aforesaid by the company the lessor paying to the company such compensation for the use of any such waggon-way railway road or other way made by them as aforesaid as in case of dispute shall be settled by arbitration as in manner hereinafter mentioned TO HAVE AND TO HOLD use and exercise the said colliery works coal-mines beds bands and seams of coal and fire-clay respectively and rights liberties privileges powers and authorities and all and singular other the premises hereby granted or demised and leased (but excepting as hereinbefore excepted) unto the company their successors and permitted assigns from the day of for the term of years from thenceforth next ensuing and fully to be complete and ended SUBJECT nevertheless to the provisoes or agreements for re-entry surrender or determination and other the covenants and agreements hereinafter contained YIELDING AND PAYING therefor yearly and every year unto the lessor during the said term the certain rent or sum of £ per annum by equal half-yearly payments on the day of and the day of in every year the first half-yearly payment to become due and be made on the day of now next AND it is hereby agreed and declared by and between the said parties hereto that in consideration for or in respect of the said certain rent or sum of £ it shall be lawful for the company from time to time and at any time during the said term to work an equivalent number of tons

Pp. 253, 275.

P. 275.

Pp. 276, 287.

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of coal the produce of the said coal-mines beds bands and seams of coal hereby demised and leased or any of them reckoning each ton of round coal the produce of any bed bands or seams of coal hereby demised and leased at and after the rate of per ton and reckoning each ton of small coals which shall be wrought out of any of the said beds bands and seams of coal hereby demised and leased at and after the rate of per ton PROVIDED nevertheless and it is hereby expressly agreed between and by the said parties hereto that the short workings of coal that shall arise or happen during any part of the said term (except the last year thereof) shall and may be worked and made up and allowed during the said term and that no short workings which shall arise or happen during the last year of the said term shall be claimed for or allowed AND ALSO YIELDING AND PAYING unto the said lessor the further rents or sums next hereinafter mentioned that is to say the rent or sum of per ton for every ton of round coals the produce of any bed band or seam of coal hereby demised and leased and of per ton for every ton of small coals the produce of the said coal mines beds bands or seams of coal hereby demised and leased or any of them which shall be respectively wrought over and above the quantity or aggregate of quantities of coal which it shall be lawful for the said lessees to work in respect of the said certain rent of £ per annum hereinbefore reserved AND the further rent or sum of per ton for every ton of fire-clay the produce of the said beds bands or seams of coal and fire-clay hereby demised or leased which shall be won or wrought therefrom by virtue of these presents AND ALSO YIELDING AND PAYING therefor unto the said lessor the further rent or sum of per ton as and for a shaftage and way-leave rent for every ton of coals or fire-clay the produce of any such other colliery or coal mine adjoining and wrought as aforesaid which shall be won wrought or carried through over along or by means of any pit or shaft outstroke or outstrokes instroke or instrokes drift road railway or other way made or used by virtue of these presents AND the like rent or sum of per ton as and for a watercourse or aircourse rent for every ton of coals or fire-clay which shall be gotten from any coal mine bed band or seam of coal or fire-clay other than the coal mines beds bands or seams of coal and fire-clay hereby demised and leased which shall be drained ventilated or made workable by means of any outstroke or outstrokes instroke or instrokes from or into the said last-mentioned coal mines beds bands or seams of coal and fire-clay hereby demised and leased or any of them, but which shall not be worked or led away by means of or through such outstroke or outstrokes instroke or instrokes AND it is hereby agreed and

Pp. 237, 290.

Pp. 276, 287.

Pp. 320 *et seq.*, 366.

Pp. 236, 274, 366.

Pp. 288 *et seq.*

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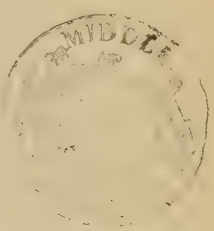
declared between and by the said parties hereto in manner following that is to say the said several tonnage rents shall be calculated upon all coals and fire-clay wrought and brought to bank or carried away sold or otherwise disposed of without any deduction or allowance for waste or for coals used or consumed in or about the working of the said coal mines beds bands or seams of coal and fire-clay hereby demised and leased. And that all the rents or sums of money hereinbefore reserved shall be paid in lawful money of the United Kingdom and free and clear of and from all cesses rates and taxes whether parliamentary or parochial (except the lessor's property tax) And that the said tonnage rents shall be paid yearly on the day of in every year for all coals wrought raised and led away and sold disposed of consumed or used as aforesaid during the year next preceding each day of payment and for or in respect of which such rents shall be payable And also that for the purposes of these presents a "ton" of coals shall be considered as consisting of and weighing 20 cwt. of 112 lbs. avoirdupois And that a proportionate part of the said several rents shall be paid for any less quantity than a ton And that the term "round coals" shall be considered as comprising all coals wrought out of the said coal mines beds bands or seams of coal hereby demised and leased which shall not be screened, or which shall pass over a screen the bars of which are not more than half an inch apart And that the term "small coals" shall be considered as comprising all coals so wrought which are passed through a screen the bars of which are not more than half an inch apart.

And the company hereby covenant declare and agree with and to the lessor and (by way of separate covenant) with the person or persons for the time being entitled to the coal mines, etc. hereby demised and leased immediately expectant upon the determination of the term hereby limited in manner following that is to say— Pp. 277, 286.

1. [*To pay rents.*]
2. [*To pay taxes.*]
3. [*To pay surface damages.*]
4. [*To make level crossings and over and under crossings.*]
5. [*To fence railway pits, etc.*]
6. [*To keep mines drained and ventilated.*]
7. [*Not to work barriers.*]
8. [*To provide frame-dams.*]



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Pp. 327, 422.

9. And shall and will from time to time and at all times hereafter save harmless and keep indemnified the lessor from all loss costs charges damages and expenses that he shall sustain or incur by reason or in consequence of the said barriers hereinbefore excepted being carried away or reduced or diminished contrary to the provisions of these presents or of any such outstroke or instroke not being effectually stopped up or secured pursuant to the covenant in that behalf hereinbefore contained And also shall not nor will do commit or suffer any wilful or negligent act matter or thing in the working and carrying on of the said coal mines, etc. hereby demised whereby the same shall or may be damnified drowned or overburdened with water or styth or which may occasion or bring on any creep or thrust upon the air-courses or watercourses thereof but shall and will so far as may be necessary for the due and proper working thereof keep the levels and drifts open and free and the necessary staples for air clear and in good repair and condition And also—

10. [*To manage mines in most approved mode in district.*]

11. [*To pay for coal lost by improper working as if actually worked out.*]

12. [*To keep plans and sections, etc., for lessor's use.*]

13. [*To keep books of accounts distinguishing lessor's coal from other coal.*]

14. [*To deliver tonnage accounts on specified half-yearly days.*]

15. [*To afford inspection of books to lessor's agent, etc.*]

16. [*To permit use of check-weigher by lessor.*]

17. And also that the company shall nor at any time during the said term use any screen or screens for screening the coals gotten from the said coal-mines, etc. hereby demised having the bars thereof more than half an inch apart and the said lessor or his agent may when and so often as he shall think proper inspect and measure such screens and if the bars of the same screens shall on any inspection be found to be more than the specified distance apart the said company shall on being thereunto requested by the said lessor or his agent cause the screen to be rectified as soon as practicable and also make compensation to the said lessor for or in respect of such breach of covenant such compensation if the

parties cannot agree to be settled by arbitration AND ALSO— APP. (C.)

18. [*To keep uniform boxes, waggons, etc., altering sizes only upon two months' notice.*]

19. To permit lessor's agent to measure tubs, etc. and if upon any such measuring or weighing the same shall be found to contain more than the acknowledged and specified quantity in such case the said lessor or his agent may stop the same so containing an excess in quantity until the said company shall reduce the same to the uniform and acknowledged capacity and that such tubs boxes or other vessels shall be deemed to have contained such excess of quantity for one calendar month next preceding such measuring or weighing thereof or of the contents thereof and shall be accounted for accordingly unless the same shall have been measured or weighed within the space of one calendar month and then only from the time of such previous measuring and weighing.

20. [*To keep weighing machines at each pit.*]

21. [*To allow lessor, etc., to use same machines.*]

22. [*To enable lessor to descend mines and examine.*]

23. [*To lend overmen to assist in lessor's surveys.*]

24. [*To permit lessor to inspect buildings and works.*]

25. [*Not to permit use of works by others.*]

26. [*Not to assign or underlet without consent.*]

27. [*To close up outstrokes and instrokes at end of lease.*]

28. AND ALSO deliver up to the lessor the quiet and peaceable possession of the said coal mines, etc. hereby demised with all pits shafts drifts engine-houses sheds erections and buildings with the roofs walls and timbers thereof and the doors windows and other fixtures belonging thereto and all such staples drifts levels air-courses air-tubes watercourses brattices tram and rolley ways roads railways and other works and conveniences as shall at any time during the said term be used by the company in working or carrying on the said coal mines, etc. hereby demised or any of them in good repair and condition and especially will deliver up the shafts and principal air-courses in a perfect state without any payment or consideration for the same unless prevented by unavoidable creeps thereunder or other accidents or unless the same Pp. 264, 305, 315, 321, 328.

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shafts and air-courses shall have been previously abandoned or relinquished by the said company with the consent in writing of the said lessor or his viewer or agent Save and except the gins engines trams rolleys waggons baskets boxes tubs ropes and machinery iron-plates rails and chairs and the sleepers and rollers on any tram or rolley-way or railway and all movable colliery stock or plant chattels and utensils which (subject to the right of purchasing the same hereinafter given to the person or persons who for the time being shall be entitled to the possession or to the receipt of the rents and profits of the said coal mines, etc. hereby demised and to his or their guardian or guardians hereinafter mentioned) it shall be lawful for the company to remove on the expiration or other sooner determination of the said term or within six calendar months thereafter on payment of the rents or sums of money and performance of the covenants and conditions herein reserved and contained And also—

Pp. 263, 264, 265.

Pp. 262, 336, 429.

29. [*To restore lands permanently injured or else pay fee simple value.*]

30. And that it shall be lawful for the person or persons who for the time being shall be entitled to the possession or receipt of the rents and profits of the said coal mines, etc. hereby demised or his or their guardian or guardians during his or their minority or respective minorities at the expiration or other sooner determination of the said term (he or they having given to or left at or sent by the general post to the registered office or place of business or last known registered office or place of business of the said company in England or to any office of the said company in the said county six calendar months' notice in writing of his or their intention so to do) to purchase all or any part of the stock of coal or fire-clay respectively and the machinery railroads engines tools trams rolleys waggons baskets boxes tubs ropes iron-plates rails and chairs sleepers and rollers movable colliery stock or plant chattels utensils and implements used and employed by the said company in upon or about the premises hereby demised at a price to be agreed upon or in case of disagreement at a valuation thereof to be made by three indifferent persons or any two of them one of such persons to be chosen by the person or persons so intending to purchase and one other of them by the said

company and the third by the said two persons so first chosen.

PROVIDED ALWAYS—

(1) [*Power of distress if rent in arrear twenty-one days.*]

(2) [*Power of re-entry if rent in arrear forty days and fourteen days' demand of payment.*]

(3) [*Power of re-entry for breach of covenant after notice thereof and three calendar months' non-compliance.*]

(4) [*Power for lessee to determine term at end of seventh, tenth, thirteenth, sixteenth, or nineteenth year.*]

AND the lessor hereby covenants with the company that the company (paying the certain and other rents and sums of money hereby reserved in the manner and on the several days hereinbefore appointed for the payment thereof respectively and performing the several covenants herein contained and on the part of the company to be observed and performed) shall and may at all times hereafter during the said term of years hereby created determinable nevertheless as hereinbefore provided peaceably have hold exercise and enjoy the said coal mines, etc. and liberties and all and singular other the premises hereby demised without any eviction denial or interruption of from or by the lessor or any person or persons lawfully claiming or to claim by from through or under or in trust for him PROVIDED LASTLY and it is hereby agreed and declared between and by the parties hereto that if any dispute or difference shall at any time or times during the said term or after the expiration or sooner determination thereof and before the discharge and release of the company from all liability under these presents arise between the lessor and the company on account of the breach or supposed breach of any of the covenants or agreements herein contained or otherwise touching or concerning the working or carrying on of the said coal-mines, etc. hereby demised or in any way relating thereto or to these presents the matter of every such dispute or difference as well as every matter or question hereinbefore expressly directed and agreed to be settled by arbitration shall by either of the parties interested therein be reduced into writing and submitted to arbitration in manner following that is to say each party so interested whether consisting of one or more person or persons shall appoint an arbitrator but in case either of the parties shall fail for seven clear days after the other party shall have appointed an arbitrator and shall have served the party so failing to appoint with notice in writing to make the appointment the party who has appointed an arbitrator may appoint such arbitrator to act

Pp. 277, 281, 311, 323.

Pp. 442 *et seq.*

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No. 7.—Lease of Coal and Iron [Staffordshire District].

Pp. 273 *et seq.* This indenture, etc. Between A. B. etc. (tenant for life and donee of power to grant mining leases) of the one part and C. D. etc. (hereinafter called the lessee) of the other part Witnesseth that in consideration of the rents, etc. the said A. B. in the exercise of the power, etc. doth hereby demise and grant unto the lessee his executors administrators and assigns Firstly

P. 273. all those mines seams measures or strata of coal called the Brooch Coal the Thick Coal and the Heathen Coal and also all those mines beds or strata of ironstone called the Grains Ironstone the Gubbin Ironstone the New Mine White Ironstone and the

Craddock Ironstone lying and being in and under ALL those parcels of land situate in the parish of in the county of particularised in the first schedule hereto and delineated on the plan drawn on the back of the skin of these presents and thereon coloured red containing together by admeasurement or thereabouts and now in the occupation of the several persons named in the same schedule TOGETHER with liberty for the lessee his executors administrators and assigns and his and their miners agents workmen and servants to enter upon so much of the said lands on the said plan coloured as shall not be used or required by the said A. B. or his assigns or other the person or persons for the time being entitled to the premises in reversion expectant on the term intended to be hereby granted (all of whom including the said A. B. and his assigns are hereinafter included in the terms the reversioner or reversioners) for carrying on any mining operations or for any roads railroads cuts canals basins drains or watercourses or the cuttings embankments or towing paths thereof and to occupy such parts thereof as may be necessary or convenient for carrying on the working of the said mines of coal and ironstone firstly hereby demised the lessee his executors administrators or assigns giving one calendar months' previous notice in writing signed by him or them or his or their agent to the tenants of the said lands or leaving the same for them at their usual places of abode and specifying in every such notice the particulars and quantity of land intended to be entered upon and taken possession of and first agreeing with the said tenants for such entry and making full satisfaction to them for all loss or damage to be done to the crops then standing and growing upon the said lands so entered upon and taken possession of and for all other loss or damage whether immediate or consequential to be sustained by them by reason of such entry and taking possession AND ALSO with liberty for the lessee his executors administrators and assigns [*to make construct and set up machinery*] AND ALSO with liberty for the lessee his executors administrators and assigns to dig for and get the common brick clay upon or under the said lands and to make and burn therefrom so many bricks as he or they shall think proper without paying any royalties for such as shall be used in the erection or making of any buildings erections pit-shafts watercourses soughs tunnels or drains in or upon the said lands or for any other purposes that may be requisite or convenient for working the said mines of coal and ironstone but paying the royalty hereinafter reserved for all such bricks as shall be taken away from the said premises for sale or otherwise and provided that no clay shall be gotten or bricks made for sale or otherwise than for

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P. 274 (*add.*)

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the purposes aforesaid without the previous license in writing of the reversioner or reversioners And generally to do and perform [*all acts matters and things necessary or expedient to be done and*
P. 273. *performed upon the lands on which entry allowed*] And Secondly all those mines seams measures or strata of coal called the Brooch Coal the Thick Coal and the Heathen Coal and also all those mines beds or strata of ironstone called the Gubbin Ironstone the New Mine White Ironstone and the Craddock Ironstone lying and being in and under ALL those messuages yards parcels of land roads and premises situate in the parish of aforesaid and particularised in the second schedule hereto and delineated on the said plan drawn on the back of the skin of these presents and thereon coloured containing by admeasurement, etc. in the occupation, etc. with the surface of which said last-mentioned lands and the messuages and erections thereon the lessee his executors administrators and assigns is and are not to interfere or permit any interference or damage of any kind or on any account except such as shall be unavoidably occasioned by working the said mines secondly hereby demised in accordance with the provisions of these presents and for which he and they
Pp. 150, 230, 274, 304, 336. shall make compensation as hereinafter mentioned TOGETHER with liberty for the lessee his executors administrators and assigns and his and their miners agents workmen and servants by means of underground workings only from the mines and premises first hereinbefore demised and not by entering upon the surface of the said lands secondly hereinbefore described to work get raise carry away sell and dispose of for his and their own benefit the said mines of coal and ironstone secondly hereby demised and to sink drive work and make such underground adits watercourses soughs tunnels drains passages and tram or other ways under any parts of the same lands and generally to do and perform all such other acts and things as may be necessary or expedient for getting converting selling disposing of and carrying away the produce of the said mines of coal and ironstone secondly hereby demised to the greatest advantage [*Exception of all other*
P. 275. *mines and minerals,—with liberty of getting the same* : AND with liberty also to enter into and make use of such of the shafts and pits of the lessee his executors administrators or assigns as he or they shall have discontinued working and shall have no further use for the reversioner or reversioners making an allowance to the lessee his executors administrators or assigns for the bricks and curbs in the pit-shafts so used which shall have been sunk by the lessee his executors administrators or assigns after the rate of for each of the curbs and per thousand for such of the bricks therein as may have been purchased by the

lessee his executors administrators or assigns and not made out of the surface clay to be gotton out of the said lands] To HAVE AND TO HOLD the premises hereinbefore expressed to be hereby demised and granted unto the lessee his executors administrators and assigns for the term of years from the day of 19 YIELDING AND PAYING [*surface rent*] AND ALSO YIELDING AND PAYING for and in respect of the coal lumps slack coke and ironstone to be from time to time during the said term gotten made or burnt from and out of the said mines hereby demised and for and in respect of the bricks (except as aforesaid) to be from time to time made and burnt from the surface clay in and upon the said lands and premises firstly hereinbefore described the several royalties following (that is to say) The royalty or sum of for each quantity of 2,520 pounds (and so in proportion for any less quantity) of coal lumps or slack (except fine slack as hereinafter described) The royalty or sum of for each quantity of 2,520 pounds (and so in proportion for any less quantity) of fine slack (slack passing under the denomination of fine slack to be such only as will go through a riddle with meshes of one inch square all other slack being liable to the aforesaid royalty of) AND if and whenever the lessee his executors administrators or assigns shall during the said term sell or dispose of use or consume as or for fine slack any coals lumps or slack liable to the royalty of hereinbefore reserved in respect thereof then for and in respect of each quantity of 2,520 pounds (and so in proportion for any less quantity) of coals lumps or slack improperly sold or otherwise disposed of used or consumed as fine slack in addition to the royalty on fine slack hereinbefore reserved so much and such further royalty as shall make the royalty for the whole of such fine slack equal to the full royalty of hereinbefore reserved in respect of all coal lumps and slacks other than fine slack The royalty or sum of for each quarter of eight bushels (and so in proportion for any less quantity) of coke made or burnt from coals lumps or slack gotten out of the said mines The royalty or sum of for each quantity of 2,520 pounds (and so in proportion for any less quantity) of ironstone of every description gotten out of the said mines And the royalty or sum of for each quantity of 1,000 bricks of the ordinary size (and so in proportion for any less quantity) made and burnt from the common brick or surface clay lying in or under the lands and premises first hereinbefore described and which shall be sold or carried away from the said premises AND if and whenever the lessee his executors administrators or assigns shall during the said term permit any boat or other vessel or any waggon cart or other carriage or any

APP. (C.) P. 275.

Pp. 276, 287.

App. (C.) horse or other beast to be laden with or any person or persons whether belonging to the colliery or works or otherwise to take or carry away from or shall in any manner use consume or otherwise dispose of in and upon the said premises any coal lumps slack coke ironstone or bricks without the whole of such coal lumps slack coke ironstone or bricks being first gauged measured weighed or numbered and the entire quantities and prices or value thereof respectively as the case may be having been first entered in the books of account of the lessee his executors administrators or assigns for the purpose of the royalty being charged thereon Then and in such case YIELDING AND PAYING for and in respect of each quantity of 2,520 pounds (and so in proportion for any less quantity) of coal lumps slack or ironstone respectively and for and in respect of each quantity of 1,000 bricks (and so in proportion for any less quantity) with which such boat or other vessel waggon cart or other carriage horse or other beast shall be laden or which any such person or persons shall take or carry away or which shall in any manner be used consumed or otherwise disposed of as aforesaid of which the whole or any part or parts shall not have been gauged measured weighed and numbered and brought into account as aforesaid the
P. 355. further penal royalties following that is to say in respect of coal lumps and slack except fine slack in respect of fine slack in respect of ironstone in respect of coke and in respect of bricks AND if and whenever the lessee his executors administrators or assigns shall during such part of the said term as the said mines hereby demised shall continue unexhausted and capable of producing the quantity hereinafter mentioned in any quarter of a year (such quarter to be reckoned from the several days on which the quarterly accounts shall be made up as hereinafter mentioned) neglect omit or refuse to get and raise or make and burn out of the said demised mines such quantities of coal lumps slack coke and ironstone as will produce at the rents and royalties aforesaid (exclusive of the said surface rent and penal royalties and royalty on bricks) the minimum
Pp. 291 *et seq.* mine rent of £ in each such quarter THEN YIELDING AND PAYING the mine rent of £ in each such quarter in the same manner as if the quantities of coal lumps slack coke and ironstone which at the royalties aforesaid would have amounted to that sum had been actually gotten and raised or made and burnt out of the said demised mines in such quarter The said several rents and royalties to be paid quarterly on the said several days hereinbefore appointed for payment of the said surface rent and the first quarterly payment of the said several rents and royalties other than the penal royalties, to be made on

the day of 19 and the first payment of the said penal royalties to be made on such of the same days as shall happen next after the said penal royalties shall have accrued and all and singular the several rents and royalties hereinbefore reserved to be paid clear of all deductions (except in respect of land-tax and landlord's property tax).

[*Proviso that if lessee prevented by accident from working mines, minimum mine-rent not to be payable.*]

[*Making up short workings.*]

[*Royalty not to be paid on coal supplied to the reversioner nor for slack used for working engines.*]

[*Power of distress.*]

Covenants by the lessee—

1. [*To make up quarterly accounts of coal, etc., gotten.*] Pp. 277, 286 *et seq.*
2. [*To pay rents and royalties.*]
3. [*To pay taxes.*]
4. [*To work the mines forthwith and continuously until they are exhausted.*]
5. [*To work the same so as to raise sufficient coal, etc., to produce minimum mine-rent.*]
6. AND ALSO will before sinking any pit-shafts or getting any clay or before erecting any engine gin whimsey or other erection or making any roads or railroads upon any part of the said lands firstly hereinbefore described or before using any part thereof for any purpose under the liberties hereinbefore granted cause all the soil and earth on such part of the surface of the said lands as shall be entered upon and used for the purposes aforesaid to be carried off and placed upon some other part of the said lands convenient for the purpose and approved of by the reversioner or reversioners or his or their agent and will carefully preserve the same for the purpose of being re-spread upon the surface of the said lands, and so from time to time as often as any other parts of the said lands shall be taken and broken up by the lessee his executors administrators or assigns under the liberties hereinbefore granted. Pp. 3, 19, 262, 336, 429, 430.
7. AND ALSO will before entering upon and taking any part of the said lands first hereinbefore described under P. 274 (*add.*)

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the liberties hereinbefore granted from time to time leave a notice in writing under his or their hand or hands at the most usual or last-known place of abode in England of the tenants or occupiers for the time being of the surface of the lands so to be entered upon and taken one calendar month at least before such entry specifying in each notice the situation and quantity of land so to be entered upon and taken.

Pp. 42, 286, 315.

8. And also will before entering upon and taking any part of the surface of the same lands pay or tender unto the tenants or occupiers for the time being of such surface fair and reasonable compensation in money for the value of the growing crops and herbage upon the lands so intended to be entered upon and taken and also for any other loss or damage that may be sustained by such tenants or occupiers by reason of such entry and taking possession as aforesaid the amount of such compensation in case of difference to be settled by arbitration under the provision in that behalf hereinafter contained.

9. And also will make good all damage that may be done to the surface of the said lands firstly hereinbefore described and will not on any account or in any manner interfere with or damage the surface of the said lands secondly hereinbefore described or any buildings thereon, except such as may be unavoidably occasioned by working the mines secondly hereinbefore described in accordance with the provisions of these presents.

10. And also will in case of any such damage as last aforesaid pay to the reversioner or reversioners tenant or occupier of such last-mentioned surface reasonable compensation in money for the damage so occasioned the amount of such compensation in case of difference to be settled by arbitration under the provision in that behalf hereinafter contained.

Pp. 434, 435, 436.

11. And also will forthwith fence off with good oak posts and double rails or with good single iron rails or hurdles in a substantial and workmanlike manner such part of the lands firstly hereinbefore described as shall from time to time under the liberties hereinbefore granted be entered upon used and occupied by him or them for the purpose of working the said demised mines and will at all times during the said term or

during such part thereof as the same lands shall continue to be in his or their occupation keep such fences in good repair.

12. [*To work the mines according to best mode of working similar mines.*]

13. AND ALSO will sink for and open in the deep such part of the said mines of coal and ironstone hereby demised as now remain unopened and in the solid and will proceed in the working of the same mines and also of such parts of the said mines of coal and ironstone hereby demised as are already opened in a regular course of working from the deep to the crop without any intermission or delay. Pp. 229, 303 *et seq.*

14. AND ALSO will not do or suffer to be done any wilful negligent or improper act in the working of the said mines of coal and ironstone hereby demised by means whereof an undue proportion of fine slack may be produced therefrom and will use his and their utmost endeavours to get and raise thereout as much large coal and lumps and slack not being fine slack as can be reasonably gotten.

15. AND ALSO will not do or suffer to be done any wilful negligent or improper act or thing which may hazard or endanger the drowning or setting on fire of any part of the said mines hereby demised or the said excepted mines and minerals or any adjoining mines and minerals now subject to the limitations of the said will of the said X. Y. deceased or occasion any loss or damage thereto but will keep the headways levels and drifts and the necessary passages for air and water clear and free during the said term or until the mines hereby demised shall be worked out.

16. AND ALSO in case the working of the said mines hereby demised or any part thereof shall be impeded or stopped by any unavoidable accident by fire or water will use his and their utmost endeavours without delay to remove such impediment or obstruction and to remedy such unavoidable accidents and will with all possible speed recommence and continue the regular working of the said mines.

17. [*Not to suffer headways, etc., to be driven from other mines without license of reversioner but will permit reversioner to drive such headways, etc.*]

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18. And also will effectually quoin every pit-shaft to be sunk and made for the purpose of working the said mines hereby demised with good bricks and mortar and with proper curbs of good sound oak in a workmanlike manner.

19. And also will at his or their own expense until the said shafts and also the shafts already sunk in the said lands firstly hereinbefore described shall be arched over or given up to the reversioner or reversioners as hereinafter specified well and substantially repair and amend the quoining and curbing of the said shafts respectively.

Pp. 231, 399, 425, 448.

20. And also will not work any of the said mines of coal and ironstone lying within a radius of yards from the walls of any pit-shaft already sunk or hereafter to be sunk but will leave a quantity of coal and ironstone to the length of yards and the breadth of yards and the area of superficial square yards to support each pair of shafts and a proportionate quantity of coal and ironstone to support a single shaft.

21. And also will in addition to the quantities of coal and ironstone which shall be left for the support of the pit-shafts pursuant to the covenant hereinbefore contained leave such quantities of coal and ironstone as and for ribs round the boundaries of the said mines as the reversioner or reversioners or such mine-agent shall think necessary for the preservation of the drains aircourses and watercourses belonging to the said demised mines.

22. [*To keep machine-houses in repair.*]

23. [*To permit the reversioner to erect weighing machine thereon.*]

24. [*To provide persons to attend to the same.*]

25. [*To cause all coal, etc., taken away by land carriage to be weighed, and all boats to be gauged.*]

26. [*To cause all weights, quantities, etc., to be entered in proper books of account.*]

27. [*To permit the reversioner and his agents, etc., to be present at all weighings.*]

28. [*To deliver monthly accounts.*]

29. [*To permit the reversioner, etc., to enter to examine workings.*] APP. (C.)

30. [*To remedy improper working on receiving notice, and in default to permit reversioner to stop workings until lessee shall have complied with notice, and if lessee shall dissent from the opinion of persons giving the notice the question to be settled by arbitration.*]

31. [*To arch over pits no longer used.*]

32. [*To level watercourses, roads, etc., no longer used.*]

33. [*To level each year lands entered upon and no longer used, and restore same to state fit for cultivation, and fence off such lands from other lands used for mining purposes, and to continue to pay surface rent until six months after lands are levelled and notice given thereof.*] Pp. 262, 236, 429.

34. [*To supply the reversioner with certain quantity of coal free of charge.*]

35. [*To purchase limestone for furnaces from reversioner, and pay for same each quarter day and not to buy lime from other persons except when reversioner cannot or will not supply same.*]

36. [*Not to assign or underlet without license.*]

37. [*To deliver up the mines and premises at end of term.*]

[*Proviso for re-entry.*]

[*Proviso that power of re-entry may be exercised notwithstanding waiver of any prior forfeiture.*]

[*Proviso that lessee may remove certain machinery.*]

[*Covenant by lessor for quiet enjoyment.*]

[*Arbitration clause.*]

IN WITNESS, etc.

The 1st SHEDULE above referred to.

The 2nd SCHEDULE above referred to.

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No. 8.—Lease of Two Seams of Coal in (Lancashire).

Pp. 273 *et seq.* This indenture made, etc. Between A. B. etc. (hereinafter called the lessor) of the one part and C. D., E. F., G. H. and I. K. etc. carrying on business at in the county of and elsewhere as coal-masters and co-partners (hereinafter called the lessees) of the other part Witnesseth that in consideration of the rents hereinafter reserved and of the covenants by the lessees hereinafter contained he the lessor doth hereby demise and grant unto the lessees their executors administrators and assignees

Pp. 273, 342. Firstly so much (if any) of the seam of cannel coal commonly called the Cannel Mine within or under the closes of land and hereditaments in the parish of in the county of numbered in the schedule hereto and delineated on the plan drawn on the back of the skin of these presents and thereon coloured blue and yellow as lies or shall be found northward of the northern face of the fault known as the M. Fault in the Cannel Mine (the actual or supposed position and direction of which said M. Fault are indicated on the said plan by the broad line traversing the said closes of land therein coloured blue from east to west the boundaries and limits of the land under which the part intended to be hereby demised of the said Cannel Mine lies being on the said plan accurately defined and laid down on all sides except along the line of the said fault where they are only conjectural and depend upon the actual position and direction of the said fault) And secondly so much (if any) of the seam of coal commonly called the King Coal Mine within or under the said closes of lands and hereditaments numbered in the said schedule and coloured on the said plan as lies or shall be found southward of the southern face of the fault known as the N. Fault

Pp. 274, 360. in the said King Coal Mine [*the actual position, etc.*] Together with liberty for the lessees their executors administrators and assigns during the term intended to be hereby granted without entering upon or disturbing any dwelling-house or other building now being on any of the lands particularized in the said schedule or delineated on the said plan and without interfering with any railway tramway road works or privileges of any other lessee of coal minerals or stone belonging to the lessor his heirs or assigns to search for sink dig unwater ventilate work win get convert carry away sell and dispose of the said mines and coal hereby demised And for the purposes aforesaid or any of them or any purpose incidental thereto to enter upon the surface of such of the said lands particularized in the said schedule as are coloured yellow and red respectively on the said plans and to use the existing pits sunk by E. F. a former lessee of coal under part of

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the said lands at the places shown on the said plan and to deepen the said pits respectively and to use the colliery buildings and works left by the said E. F. on the said lands and to sink any other pits and to erect any other buildings and works and to make lay down and use any pit-hills spoil-banks roads railways tramways reservoirs watercourses drains engines machinery and things (but not to make coke-ovens or burn coke or cinders or make or burn bricks except in or upon the lands hereinafter in that behalf specified) that the lessees their executors administrators or assigns shall consider necessary or convenient and with locomotive engines waggons carts and horses or otherwise to have free ingress egress and regress into from through and over the surface of the said lands coloured yellow and red or any of them AND ALSO with liberty to erect make maintain and use coke-ovens and to burn coke and cinders upon and in and to dig and get brick-earth and clay and to make and burn the same into bricks in from and upon such of the said lands coloured yellow as are numbered on the said plan and in the said schedule but not elsewhere without the previous license in writing of the lessor his heirs or assigns and to use the bricks so to be made in any buildings pits or works to be erected sunk or constructed by the lessees their executors administrators or assigns under or by virtue of these presents upon in under any of the said scheduled lands and hereditaments but not to remove the said brick-earth clay or bricks from the said lands AND ALSO with liberty for the purposes aforesaid or any of them or any purpose incidental thereto below the surface of and under any of the said scheduled lands and hereditaments to drive make erect maintain and use any levels drifts tunnels airways inclined planes railways tramways roads drains steam-engines pumps and underground works whatsoever which the lessees their executors administrators or assigns shall find or consider necessary or convenient EXCEPT NEVERTHELESS and reserving unto the lessor his heirs and assigns so much and such parts of the respective mines hereby demised as lie under or are required for the support of any house or building now on the said scheduled lands and also so much and such parts of the same mines as the lessor his heirs or assigns shall find it necessary or convenient to remove and shall remove in boring for sinking to working winning getting ventilating or draining all or any of the mines beds or seams of coal minerals clay and substances whatsoever other than the said mines hereby demised lying or being within or under any of the said scheduled lands AND ALSO except and reserving as aforesaid liberty for the lessor his heirs and assigns and his and their lessees or tenants during the term intended to be hereby granted upon the terms and

Pp. 2, 8, 47, 361, 372, 373, 451.

Pp. 41, 42, 253, 275.

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subject to the provisions in that behalf hereinafter contained to enter upon all or any of the said scheduled lands and to demise or lease and to search for bore and sink to work get carry away and sell all or any of the mines beds or seams of coal minerals clay and substances whatsoever other than the said mines hereby demised lying or being within or under the same lands respectively and for the purposes aforesaid or any of them to sink make erect and use all such pits shafts buildings engines machinery reservoirs drains levels tunnels roads works and conveniences upon through or under all or any of the said scheduled lands and the drains levels and workings of the lessees their executors administrators or assigns upon in or under the same as shall be necessary or expedient AND ALSO except and reserving as aforesaid so much of the respective mines hereby demised as lies within a radius of yards from the walls of any pit or shaft which has already been or shall hereafter be sunk or made by the lessor his heirs or assigns through the respective mines hereby demised in order to support such pit or shaft and to prevent water coming from above or out of the said mines hereby demised or either of them from flowing into such pit or shaft so far as that object can be attained by leaving such a bulwark as aforesaid around such pit or shaft BUT NEVERTHELESS (by way of demise and grant and not of exception) with liberty for the lessees their executors administrators and assigns to drive and make airways or levels being not more than feet wide each nor less than yards apart through each or any of the said excepted portions of the mines hereby demised if the same shall be required for ventilating working or getting the portions hereby demised of the same mines TO HAVE AND TO HOLD the said premises hereinbefore expressed to be hereby demised and granted unto the lessees their executors administrators and assigns for the term of years from the day of 19 YIELDING AND PAYING therefor during the said term on every day of the yearly rents hereinafter specified namely a certain yearly rent of £ whereof the first payment shall be made on the day of 19 AND over and above the said certain rent a further yearly rent after the rate of £ per foot thick per acre of the customary Cheshire measure of eight yards to the perch and so in proportion for any greater thickness than a foot and for any less quantity than a Cheshire acre in respect of so much of the cannel mine hereby demised as is two feet thick or upwards and after the rate of £ per foot thick per Cheshire acre and so in proportion for any greater or less thickness than a foot and for any less quantity than a Cheshire acre in respect of so much of the same Cannel Mine as is less than two feet thick and after the rate of £ per foot thick

Pp. 401 *et seq.*, 425 *et seq.*

P. 275.

Pp. 276, 287.

per Cheshire acre and so in proportion as aforesaid in respect of the said King Coal Mine hereby demised (whatsoever the thickness thereof may be) for so much of the said several mines and seams hereby demised respectively as shall have been gotten in the year immediately preceding each such day of the first payment of the said several footage rents to be made on such day of as shall occur next after any of the said Cannel or King Coal shall have been gotten AND a further yearly rent after the rate of £ per Cheshire acre and so in proportion for any less quantity for all the surface land which has been broken up covered with buildings pit-hills or rubbish or taken for roads or otherwise taken used or occupied for colliery purposes by the said E. F. and which now remains broken up covered taken used or occupied as aforesaid by the lessees their executors administrators or assigns under the liberties hereby granted such last-mentioned rent to be considered due on the day of 19 in respect of all land now broken up covered taken used or occupied on such day of as shall occur next after such last-mentioned land or any part thereof shall have been first broken up covered taken used or occupied and such rent when once the same shall have commenced to continue payable until the land in respect whereof the same shall be payable shall have been cleared and restored and rendered fit for agricultural purposes or shall have been paid for by a gross sum under the covenants hereinafter contained AND it is hereby agreed and declared that for the purpose of ascertaining the amount of mine-rent payable from time to time under the reservation of rents hereinbefore contained coal which shall be found unworkable or unsaleable shall not be taken into account and the measurements shall be made underground and the acreage or superficial measurement and the thickness of the coal shall be taken and measured at right angles to one another so as to ascertain the true cubical contents of the mine gotten PROVIDED ALWAYS and it is hereby agreed and declared that every default of mine not exceeding one-sixteenth part of a Cheshire acre and all bristles throws up and throws down which the lessees their executors administrators or assigns shall in working the said mine hereby demised find work up to and leave and all pillars walls and ranges which shall be permanently left by them for the support of the roof of the same mine shall in all cases under these presents be reckoned as mine gotten by them in the year only in which the same shall be worked up to and left and shall be accounted and paid for after the aforesaid footage rates or rents but no default of mine exceeding one-sixteenth part of a Cheshire acre and no pillar wall or range which is required and shall be permanently left by the lessees their executors

Pp. 291 *et seq.*, 310, 472.

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administrators or assigns for the support of existing buildings or of any pit or shaft shall be considered as mine gotten by them Provided always and it is hereby agreed and declared that the lessees their executors administrators and assigns may in every year of the said term work and get without paying any footage rent for the same such a quantity of the said mines hereby demised or either of them as at the aforesaid footage rents would yield a rent equal in amount to the said certain yearly rent of £ And that if in any year or years of the same term the lessees their executors administrators or assigns shall not actually get such a quantity of the said mines hereby demised or either of them as at the aforesaid footage rents would yield a rent equal in amount to the said certain yearly rent of £ then they may as often as any such deficiency shall happen get in any one or more of the five next succeeding years of the said term without paying any further rent for the same enough of the said mines hereby demised to make up the deficiency.

Pp. 237, 290.

[*Power of distress.*]

Pp. 277, 286 *et seq.*

Covenants by lessees—

1. [*To pay rents.*]
2. [*To pay taxes, etc.*]
3. [*To remove and preserve surface soil.*]
4. [*To commence working immediately and continue vigorously.*]
5. And in particular will so construct and use all coke-ovens and the furnaces of all steam-engines upon the said lands as that the same shall effectually consume their own smoke.
6. And also will in making and sinking under the liberties hereby granted any pit in the said lands well and sufficiently and in a workmanlike manner line and support the sides thereof (except in the several places where the same shall pass through hard rock) with iron tubing or brickwork with sound and substantial oak curbs where necessary and will during the said term keep the same in good repair and working condition.
7. And also will in working the said mines keep a good and true water-level from the deepest engine-pit that shall be sunk upon or in the said lands.
8. And also will work the said mines in the most approved manner and without committing any waste or un-

Pp. 229, 303 *et seq.*

necessary loss of coal and particularly will work and get the said several mines and seams of coal from time to time together and to an equal extent, and will not get or work one of such mines to the detriment or loss of the other of them but will get and take an equal quantity of coal from and out of each of the said mines so far as circumstances and the nature of the works will permit.

9. AND ALSO will in order to the support and safety of the said pits leave the coal in each of the said demised mines ungotten (save only by driving the airways or levels next hereinafter mentioned) within a radius of yards from the walls at the bottom of each pit AND will not drive through the coal so to be left at the bottom of the said pits as aforesaid more than two airways or levels and will not drive such airways or levels of greater width than feet or nearer to each other than yards.

10. AND ALSO will in the event of the said water-level from the lowest or deepest engine-pit not being driven truly if any exclusion or loss of coal shall be thereby occasioned pay to the lessor his heirs or assigns for the coal so excluded and which cannot be gotten on account of the level not being true as aforesaid down to the situation of a true water-mark in the same manner as if the coal had been gotten to that extent and in case of any waste or unnecessary loss of coals in the said mines or either of them being occasioned by or through any other mismanagement neglect or default of the lessees their executors administrators or assigns will pay for the coal so wasted and lost as if the same had been actually gotten.

11. AND ALSO will not bring up or suffer to be brought up at any pit that has been or shall be sunk in the said lands any coal or slack whatsoever other than and except what shall be dug or gotten from and out of the said mines hereby demised or fetch cart or carry away or permit to be fetched carted or carried away any coal or slack (except as before mentioned) in through or over the said lands or any part thereof without the previous license in writing of the lessor his heirs or assigns.

Pp. 370, 371, 373

12. AND ALSO will not in working the said mines and exercising the said liberties hereby granted damage or

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endanger any building now on the said lands and will do as little injury as is possible consistently with the fair working of the said mines to any buildings which may hereafter be erected or to the trees plants crops and herbage thereupon.

13. [*To pay for surface damage.*]

14. [*To indemnify lessor against claims by surface tenants.*]

15. [*Not to cut trees.*]

16. And also will not turn or put or suffer to be turned or put any water foul air or gas which may arise in or be drained or issue out of or otherwise proceed from the said mines hereby demised into or upon any other mine belonging to or in the occupation of the lessor his heirs or assigns or his or their lessees or tenants nor (except so far as the same may be necessarily done in working getting raising stacking and carrying away the said mines hereby demised or in the exercise of the liberties hereby granted) do or suffer to be done anything otherwise than in pursuance of the liberties hereby granted which may injure or prejudicially affect or prevent the letting or working of any such other mine or may reduce the value thereof in anywise.

17. [*To furnish yearly accounts of coals gotten and plans if required.*]

18. [*To permit lessor to inspect all lessees' plans and books.*]

19. [*And to go underground and examine mines.*]

20. [*To fence off lands used for colliery purposes.*]

21. [*Not to assign or underlet without license.*]

22. [*To deliver up the premises at end of term.*]

23. [*To make good fences and fill up pits.*]

24. [*And clear the surface.*]

Pp. 3, 19, 262, 336, 429, 430.

Provided always and it is hereby agreed and declared that in clearing such parts of the said lands as have been or shall be used for colliery purposes from pithills slack stone and rubbish the lessees their executors administrators and assigns shall not be obliged to remove such slack stone or rubbish from the said lands but may lay the same in any barren or unproductive place or places to be fixed upon by the agent for the time being of the lessor his heirs or assigns within the same lands the lessees their executors administrators or assigns levelling such slack stone or rubbish in a

workmanlike manner AND in case there shall not be within such lands any barren or unproductive places then that the lessees, their executors administrators or assigns may trench in the said slack stone and rubbish upon the field called and in that case shall cover the same with good soil at least twelve inches in thickness and level and lay down the same in a good and workmanlike manner and render it fit for agricultural purposes in which last-mentioned case they shall pay to the lessor his heirs or assigns a compensation in money for the value of the hay grass corn or other produce (if any) growing or being upon such field and also a gross sum of money calculated at the rate of £ per Cheshire acre PROVIDED ALWAYS and it is hereby agreed and declared that if the lessees their executors administrators or assigns shall sink a shaft or bore to a depth of yards from the surface without cutting either of the seams of coal hereinbefore demised then when and so soon as they shall have sunk or bored to that depth without cutting the said coal it shall be lawful for but not incumbent on them having paid the rents hereinbefore reserved and performed and observed the several covenants and agreements herein contained up to the time of surrender to surrender the said premises to the lessor his heirs or assigns and that if the lessees their executors administrators or assigns shall find the said seams of coal or either of them at a less depth from the surface than yards and by reason of any fault in the coal measures both or either of the said seams shall be thrown down under any part of the said lands to a greater depth from the surface than yards it shall be lawful for but not incumbent on them to abandon so much of the said seams or either of them as shall be thrown down below the said yards or as shall be beyond such fault and it shall not be incumbent on them to prove the extent of such fault by cutting into it nor shall it be incumbent on them under any circumstances to get or pay for any part of the said seams lying below that depth but they shall pay for at the rate aforesaid all such parts of the said respective seams as they shall get below that depth PROVIDED ALSO and it is hereby further agreed and declared that if before the expiration of the said term the whole of the workable and marketable coal hereby demised except such part thereof as it shall not be incumbent upon the lessees their executors administrators or assigns to get and which they shall permanently leave ungotton shall have been gotten it shall be lawful for them having paid the rents hereby reserved and performed and observed the several covenants and agreements herein contained up to the time of the surrender to surrender the said premises unto the lessor his heirs or assigns AND it is hereby agreed and

Pp. 321, 322.

Pp. 291, 301.

App. (C.)

declared that if in the opinion of the lessor his heirs or assigns or his or their agent it shall be doubtful whether the lessees their executors administrators or assigns are entitled under the several provisions hereinbefore contained to surrender the said premises or to abandon any part of the said mines it shall be lawful for the lessor his heirs or assigns by notice in writing delivered to the lessees their executors administrators or assigns or left at their principle place of business or on the premises to require them to prove at their own expense by actual experiments and proper evidence to the reasonable satisfaction of the lessor his heirs or assigns that the state of circumstances under which they claim to surrender the said premises or abandon any part of the said mines actually exists and the premises shall not be surrendered nor the part of the mines claimed to be abandoned until such evidence shall have been given or if the lessees their executors administrators or assigns shall require the question to be referred to arbitration under the provisions in that behalf hereinafter contained until the arbitrators or their umpire as the

Pp. 302, 303.

case may be shall have duly made their award PROVIDED ALWAYS and it is hereby agreed and declared that if before the expiration of the said term the whole of the coal hereby demised except such part thereof as it shall not be incumbent upon the lessees their executors administrators or assigns to get and which they shall under the provisions of these presents permanently leave ungotten shall have been gotten and paid for at the rates or rents hereinbefore reserved then and thenceforth the

Pp. 263—265.

said term of years shall absolutely determine PROVIDED ALSO and it is hereby agreed and declared that the lessees their executors administrators or assigns may at any time before or within calendar months after the expiration or sooner determination of the said term take down remove and convert to their own use the materials of all such engines pumps iron-tubing shafts staiths whimseys ropes rails and works (except as hereinafter is mentioned) as now are or shall have been erected set up fixed or made upon to or under the aforesaid lands or any part thereof for working getting or carrying away the said mine demised to the said E. F. as aforesaid or the said mines hereby demised making reasonable satisfaction for all damage that may be done to the same lands by such removal but except for the purpose of rebuilding the same on some other part of the said lands or of repairing the same and except so far as may be necessary for the removal of any engine or machinery thereon the lessees their executors administrators or assigns shall not be at liberty to remove or pull down wholly or partially any building of brick or stone which the said E. F. or they may have erected

on the said lands other than or besides any engine house that may stand upon or at the bank or brow of any pit or shaft that shall be filled up under the provisions hereinbefore contained and which it shall be found necessary to pull down for the purpose of removing such bank or brow and even in such case the materials of the said buildings shall not be removed from the said lands but shall be carefully piled up and deposited in some convenient place thereon.

[*Power for lessor to take lessees' machinery at a valuation.*]

[*Power of re-entry.*]

PROVIDED ALWAYS and it is hereby agreed and declared that no breach non-performance or non-observance of any of the covenants hereinbefore contained except the covenants for payment of rent and the covenant for allowing the lessor his heirs or assigns to descend the lessees' pits and examine the underground workings of the mines hereinbefore demised shall give any right of re-entry or be a cause of forfeiture of the said term under the proviso for re-entry hereinbefore contained unless and until the lessor his heirs or assigns shall have given to the lessees their executors administrators or assigns or their principal manager for the time being or shall have left for them or him at the colliery a notice in writing specifically mentioning the breach or breaches of covenant complained of and requiring the same to be remedied and default shall have been made for three calendar months from the time of giving or leaving such notice in performing or observing the covenant or all or any of the covenants a breach non-performance or non-observance whereof shall have been so notified and complained of as aforesaid AND it is hereby expressly declared that the lessor his heirs and assigns and his and their lessees and tenants may bore and sink to search for work get demise lease sell or otherwise dispose of every or any mine of coal or cannel and any minerals or substances other than the mine hereinbefore demised which may be within or under the said lands particularized in the said schedule and may exercise and grant any powers for searching for working ventilating draining getting raising banking carrying away selling and disposing of such other mines minerals and substances or any other mines minerals or substances in from upon over and through the same lands and every part thereof or any other lands but without prejudicially interfering with the actual and *bonâ fide* use and enjoyment of the mines and liberties hereinbefore demised and granted he or they making reasonable compensation and satisfaction to the lessees their executors administrators or assigns for all damage or injury done or occasioned by or by reason

Pp. 234, 278, 310.

Pp. 275 *et seq.*

App. (C.)

of the searching for working ventilating draining getting raising banking or carrying away of any such other mines minerals or substances to the said mines hereby demised, or either of them or to the buildings pits ways roads or works of the lessees their executors administrators or assigns in upon or over the said lands And also that the lessor his heirs or assigns and his and their lessees and tenants may use all such eyes pits shafts reservoirs and holes in or upon the same lands as shall have become useless to or shall have been *bonâ fide* disused and abandoned by the lessees their executors administrators or assigns but without prejudice to the liberties hereby granted to them so far as such liberties may be then really and actually necessary or convenient for working getting raising banking carrying away selling and disposing of the said mines hereby demised.

[*Lessor's covenant for quiet enjoyment.*]

[*Arbitration clause.*]

In witness, etc.

The Schedule referred to in the foregoing Indenture.

No. 9.—Lease of one Seam of Coal by way of deferred Sale.

Pp. 273 *et seq*

This indenture, etc. Between A. B. and C. D. etc. (hereinafter called the lessors) of the one part and E. F. etc. (hereinafter called the lessee) of the other part Witnesseth that the lessors do hereby demise unto the said lessee all that mine of coal called the Mine lying under the lands and premises of the lessors situate in, etc. now or late in the occupation of, etc. and which lands and premises are delineated on the plan drawn in the margin hereof and the outward boundaries thereof are edged with a colour with full powers to work the demised mine but by underground workings only and either alone or in connection with any adjacent mine or adjacent parts of the said Mine To hold the said mine and premises for the term of years from the day of 19 Yielding and paying therefor the fixed or certain yearly rent of £ by two equal half-yearly payments the first payment thereof to be due and payable on the day of next and also yielding and paying a substituted yearly footage rent of £ per foot thick per Cheshire acre for the mine (horizontal measurement) in respect of such portion thereof as shall be worked or gotten during each year of the said term with power for the lessee to recoup himself any deficiency of get below the fixed or certain rent during the residue of the term

Pp. 231, 304, 363.

Pp. 276, 287.

AND the said lessee hereby covenants with the said lessors that he will work the said mine in a fair and workmanlike manner and pay the rents hereby reserved and also will at the end of the said term duly pay (so far as he shall not have already paid) the value of the whole of the said demised mine at the footage rate aforesaid except such portion thereof as may be left for the support of buildings or as may be intersected or cut off from the lessee's colliery workings by a fault and will make full compensation for all damage occasioned to the buildings or erections on the said lands by the working of the said mines or of any adjacent mine worked by him in connection therewith AND the lessee hereby grants unto the lessors their heirs and assigns and their or any of their mining engineers or agents full and free liberty power and authority from time to time to descend at any of the pits of the lessee and to traverse therefrom through the workings communicating with the mine hereby demised and to make all surveys and measurements necessary for ascertaining the quantity of coal gotten out of the said hereby demised mine and to do all other acts and things whatsoever for the ascertainment of matters and things in which they the said lessors may have any interest in respect of this lease. IN WITNESS, etc.

Pp. 300 *et seq.*

Pp. 267, 289, 370, 445.

No. 10.—Demise of Coal (small piece) by way of immediate Sale. [Lancashire district.]

THIS INDENTURE, etc. BEWEEN A. B. and C. D. etc. of the one part and the X. Company limited of the other part WITNESSETH that in consideration of the sum of £ (*being the ascertained value mutually agreed upon*) this day paid, etc. [*the receipt, etc.*] they the said A. B. and C. D. do hereby grant and demise unto the said company their successors and assigns ALL and singular the several mines beds and seams of coal and cannel called respectively the Cannel Mine the Yard Mine and the Arley Mine within and under [*parcels*] containing by admeasurement, etc. and more particularly delineated, etc. TOGETHER with full and free liberty to work get and carry away coal without entry on surface and by underground workings only using such workings also for adjacent mines and making compensation for surface damage (if any) TO HAVE, etc. the said mines liberties, etc. unto the said company their successors and assigns [*for term of years*] subject nevertheless to [*any existing lease, etc.*] YIELDING AND PAYING yearly and every year during the said term the rent of one peppercorn if the same shall be lawfully demanded.

Pp. 273 *et seq.*

App. (C.)

Lessees' covenants—

1. [*To work.*]
2. [*To work in a skilful manner.*]
3. [*To pay compensation for surface damage.*]
4. [*To keep and produce working plans.*]
5. [*To permit lessors to view mines and to descend pits, etc., and make diallings, etc.*]

[*Lessor's covenant for quiet enjoyment.*]

In witness, etc.

No. 11.—Lease of Smelting Works.

Pp. 273 *et seq.*

This indenture made the day of 19 Between [*lessor*] of the one part and [*lessees*] of the other part Witnesseth that in consideration of the rent covenants and agreements hereinafter contained and on the part of the said [*lessees*] their executors administrators and assigns to be paid and performed he the said [*lessor*] doth by these presents grant and demise unto the said [*lessees*] their executors administrators and assigns all, etc. [*parcels*] Together with full and free liberty and authority for them the said [*lessees*] their executors administrators and assigns on any part of the said pieces or parcels of ground hereby demised to erect and establish any works for the smelting and manufacture of iron in any of its branches or departments and to erect and construct accordingly all such furnaces coke-ovens steam and other engines machinery reservoirs aqueducts workmen's houses offices buildings and works as may be proper and

P. 433.

convenient for carrying on any such trade or employment And also in and upon the said pieces or parcels of ground to lay down and deposit all the scoria and other refuse which shall be produced from the said intended ironworks as aforesaid And also with full and free liberty from time to time to alter and convert such intended works into any other works for any other manufacture or purpose as often as the said [*lessees*] their executors administrators and assigns shall think proper but so that such alteration and conversion be made at all times with the consent in writing of the said [*lessor*] his heirs or assigns and so that any such other works shall not be for the making of alkali or be prejudicial to the health of the inhabitants in the neighbourhood or to the agricultural and other produce thereof And

Pp. 41, 136 *et seq.*, 275, 366.

also with full and free liberty to use and employ all such railways or other ways and roads which are now laid down and used upon any part of the lands hereby demised or upon any part of the

adjoining lands of the said [*lessor*] which lead to or from the said intended works and all the buildings machinery and works necessarily and actually connected therewith for the conveyance of all the iron-ore ironstone coals coke limestone and all other minerals articles and materials whatsoever which shall be required for the purposes aforesaid and of all the iron articles and things to be made or manufactured as aforesaid but so as not to give any unnecessary disturbance or interruption to any persons entitled from time to time to use any such ways or roads aforesaid for any purposes whatsoever AND ALSO for any of the purposes aforesaid with full and free liberty if they or he shall think proper to construct in the direction and corresponding with the line marked blue on the said map or plan indorsed on these presents a good and sufficient railway or other way or road not exceeding fourteen yards in breadth AND upon any such railways or other ways or roads aforesaid to use and employ from time to time all such engines waggons and other carriages as it is usual and proper to employ thereon respectively PROVIDED ALWAYS that the said [*lessees*] their executors administrators or assigns shall in the formation and appropriation of any such new ways or roads aforesaid pay compensation to the said [*lessor*] his heirs or assigns at the rate of per acre AND ALSO with full and free liberty for any of the purposes aforesaid to take and employ any water that may be found or procured in any part of the said demised lands or in any part of such adjoining lands of the said [*lessor*] as aforesaid: and to dig sink and search for such water as may be in or under the same or any part thereof and to conduct such water by pipes or any other means to any part of the said demised premises the said [*lessees*] their executors administrators and assigns doing the least possible damage or injury to any such lands by any such operations and immediately repairing all such damage or injury to the satisfaction of the said [*lessor*] his heirs or assigns AND ALSO with full and free liberty to search for dig take and use for any of the purposes aforesaid any building stone limestone clay gravel or sand which may be found upon any part of the said premises hereby demised EXCEPT and reserved out of this present demise unto the said [*lessor*] his heirs and assigns full and free liberty and authority at all times to use or to authorise any other persons whomsoever to use in manner aforesaid the railway or other way proposed to be so formed and constructed as aforesaid and all machinery buildings articles and works necessarily connected with the enjoyment thereof for any purposes whatsoever but so that no unnecessary hindrance or disturbance be occasioned to the said [*lessees*] their executors administrators or assigns or their workmen agents or servants and so that all persons who shall use and enjoy any such way or

Pp. 376, 388 *et seq.*

Pp. 41, 253, 275.

App. (C.)

road shall pay to them the said [*lessees*] their executors administrators and assigns reasonable compensation for the use and enjoyment thereof to be ascertained in case of dispute or difference in the manner hereinafter mentioned.

[*Habendum and Reddendum.*]

[*Covenants by lessees for payment of rent.*]

Pp. 277, 286 *et seq.*

And also shall and will from time to time pay an additional rent or sum after the rate of per acre in respect of any additional land or ground which may be appropriated by the said [*lessor*] his heirs or assigns for any of the purposes aforesaid in the manner hereinafter expressed And also shall and will at all times during the said term well and truly pay all taxes charges rates assessments and other impositions whatsoever which now are or may be hereafter charged or imposed upon or in respect of the said demised premises or any of the rights and liberties hereby granted as aforesaid And also shall and will within three months from the date of these presents proceed to erect and establish the said works for the smelting and manufacture of iron and with all reasonable diligence prosecute the same to a state of completion so as to sell the produce thereof And also in case such works intended for the manufacture of iron shall at any time or times during the continuance of this demise be altered and changed into other works for the carrying on of some other trade or manufacture with such consent as aforesaid shall and will from time to time and immediately upon such consent being had and obtained proceed to make such alteration and with all reasonable diligence prosecute and carry on the same till such other works shall be fully prepared for the purposes for which they may be designed And also shall and will at all times well and effectually fence off with walls or by some other means all the said intended works and with quick-set hedges or other fences the said railway or other way so proposed to be laid down and constructed as aforesaid from all adjoining lands And also shall and will at all times put up or erect proper gates which may be required on the line of any such proposed railway or other way with sufficient locks and keys thereto and also employ and keep proper gatekeepers which may be required for the purposes of any joint occupation or enjoyment thereof And also shall and will at all times pay and contribute their fair and proper proportion of all costs and expenses which may be incurred in maintaining and repairing any railways or other ways or roads or any other machinery buildings articles or works which shall from time to time be used by the said lessees or lessee for the time being in common with any other persons as aforesaid And also shall and

Pp. 434, 435, 436.

will at all times commit as little injury as possible to any such railways or other ways or roads machinery buildings articles or works and interrupt and interefere with as little as possible the enjoyment of any other persons entitled to use the same as aforesaid AND ALSO shall and will at all times during the said term well and truly keep and preserve in good sufficient and tenantable repair and condition all the furnaces reservoirs aqueducts houses offices buildings works railways or other ways to be so erected or constructed as aforesaid and in such good sufficient and tenantable repair and condition and fit for the further and effectual prosecution of such works shall and will at the end or other sooner determination of the said term peaceably and quietly surrender and deliver up the same and all and singular the premises hereby or to be hereby demised as aforesaid unto the said [*lessor*] his heirs or assigns for his and their own use and benefit.

Pp. 264, 305, 315, 321, 328.

[*Proviso for re-entry.*]

[*Lessor's covenants for title, etc.*]

AND ALSO shall and will at any time or times during the said term grant and demise subject to the covenant provisoes and agreements contained in these presents unto the said [*lessees*] their executors administrators or assigns all such additional land or ground adjoining to the land hereby demised as they the said [*lessees*] their executors administrators or assigns shall require for the purposes of their said works or business (except for ways or roads) at the additional annual rent or sum of per acre and in proportion for a less quantity than an acre to be payable in the manner hereinbefore mentioned with respect to the rent or sum so reserved as aforesaid AND ALSO shall and will at all times pay and contribute and cause all other persons so authorised as aforesaid to pay and contribute their fair respective and reasonable proportion of all costs and expenses which may be incurred in maintaining and repairing the said railway or other way or road so proposed to be constructed as aforesaid and any machinery buildings articles or works necessarily and actually connected with the enjoyment thereof if the same shall be so used by the said [*lessor*] his heirs or assigns or other persons aforesaid in the manner hereinbefore expressed AND ALSO shall and will interrupt and interfere with as little as possible the enjoyment thereof by the said [*lessees*] their executors administrators and assigns.

[*A proviso enabling the lessor to elect to purchase the tools and movable materials may be inserted—and the arbitration clause.*]

IN WITNESS, etc.

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No. 12.—Lease of Ironworks, and of Coal, Iron, Fire-clay, Alluvial Clay, Sand, and Building Stone, with large Surface Rights for effective carrying on of Works and development of Mineral Estate [South Wales].

Pp. 273 *et seq.*, 285 *et seq.*

This indenture made, etc. Between A. B. and C. D. etc. (hereinafter called the lessors) of the one part and E. F. etc. (hereinafter called the lessee) of the other part Witnesseth that in consideration, etc. they the said lessors by virtue of the powers, etc. and of every other power, etc. do hereby limit and appoint and also grant demise and lease unto the said E. F. his executors, etc.—

P. 273.

Firstly,—All those seams veins and beds of coal argillaceous and blackband ironstone fire-clay alluvial clay sand and building stones (except as hereinafter excepted) lying under and within the waste or common land commonly called the Common situate in the parish of in the county of and containing acres and delineated on map or plan, etc. (subject nevertheless and without prejudice to such encroachments as have been already made and now exist on the said common or any part thereof and which can or shall be legally maintained or justified and the rights of any party or parties acquired or gained or to be acquired or gained by reason of any such encroachments and subject also and without prejudice to any enclosure of the said common or any part thereof now in contemplation or hereafter to be carried into effect or any rights or interests to be acquired or created by reason thereof).

[*Power to enter on common for purpose or working, etc.*]

[*Power to enter on any part of common to be allotted, first giving notice to tenants or occupiers, and making compensation.*]

[*Power to sink pits, etc.*]

[*Power to erect workshops, etc., and to make railways, etc.*]

[*Power to quarry ironstone, etc.*]

[*Power to deposit spoil or rubbish, etc.*]

[*Power to use in common with, etc., existing pits, levels, etc.*]

[*Power to erect furnaces, engine-houses, etc.*]

[*Power to deposit refuse.*]

[*Power to connect workings under the common with workings under any adjoining property, but all minerals worked or gotten from or under demised premises to be brought to surface thereon.*]

SECONDLY,—ALL those seams veins and beds of coal ironstone fire-clay alluvial clay sand and building stone lying under and within the pieces or parcels of land and hereditaments commonly called or known as the estate situate in the said parish and containing acres and delineated on plan, etc.

[*Power to enter on secondly described hereditaments for purpose of working, etc., first giving notice to tenants and making compensation.*]

[*Power to sink pits, etc.*]

[*Power to erect workshops, etc., and to make railways, etc.*]

[*Power to quarry ironstone, etc.*]

[*Power to deposit spoil or rubbish, etc.*]

[*Power to erect furnaces, etc.*]

[*Power to deposit refuse.*]

[*Power to connect pits, levels, etc., with pits, levels, etc., under any adjoining property, but all minerals worked or gotten from under the demised premises to be brought to surface thereon.*]

THIRDLY,—ALL that piece of land called lying on the north side of the river in the parish of in the county of containing acres and delineated on plan, etc. TOGETHER with all the furnaces and other works engines engine-houses boilers mine and other kilns machinery materials works dwelling-houses offices storehouses stables workshops and other buildings and erections railroads tramroads and other roads watercourses reservoirs sluices and ponds now being on or in the said piece of land called and commonly called the Ironworks TOGETHER with full power for the said E. F. his executors, etc. at any time during the term hereby granted to work and use or extend and improve the said furnaces and other erections and works and to build on the last-mentioned piece of land other furnaces erections and works as he or they shall think fit AND ALSO full liberty power and authority for the said E. F. his executors, etc. during continuance of term hereby granted to enter upon so much of all that piece of land being a portion of the farm lying, etc. in the said parish of containing acres and delineated on plan, etc. as may be necessary for the formation of a railway to connect the said Ironworks with the Common Railway.

AND FOURTHLY,—ALL that piece of land called situate, etc. and containing acres and delineated on plan, etc. TOGETHER

App. (C.) with all dwelling-houses stables storehouses workshops and other building and yards now being on the said piece of land

Pp. 253, 275. Save and except and always reserved out of the appointment and demise hereby made full liberty power and authority for the said lessors their executors, etc.—

To use land firstly and secondly described for agricultural or building and general purposes;

And to lay down extra pair of rails (so as to make double line with sidings, etc.) on thirdly described land.

And except also all mines, etc. under the thirdly and fourthly described premises And also (as to the premises firstly and secondly hereinbefore described) all mines, etc. of what kind or nature soever not being mines, etc. of coal ironstone fire-clay alluvial clay sand or building stone And except also unto the lessors and their tenants agents, etc. full and free power from time to time and at all times during the term hereby granted to enter into upon and under the said lands and premises hereinbefore described for the purpose of working the hereinbefore excepted minerals and of manufacturing and converting the same and of carrying away and disposing of the produce thereof and to sink and drive all necessary and proper pits shafts and levels and to make all necessary and proper watercourses ponds sluices rail-roads tram-roads and other roads and to use the several existing pits adits levels drifts and other openings whether for the purpose of working the said excepted minerals or for the purpose of communicating with other lands or the minerals thereunder with all such rights liberties powers and authorities for the purposes aforesaid or any of them as are hereinbefore granted to the said E. F. the said lessors or their tenants, etc. doing no injury to any of the said demised premises or to the watercourses roads tram-roads and rail-roads thereon that can be reasonably avoided and not wilfully obstructing the said lessee in the occupation and enjoyment of the mines minerals privileges and other the premises hereby granted or any part thereof and paying or making satisfaction to the said lessee for any loss or damage which he may sustain by reason of the exercise by the said lessors, etc. of the liberties powers and authorities hereby reserved to them and the amount of such loss or damage to be settled by arbitration in manner hereinafter provided and it being understood that such underground workings and communications of the said lessors, etc. shall as far as practicable be separate and distinct from the workings of

P. 275. the said lessee To have and to hold, etc. for years subject nevertheless, etc.

YIELDING AND PAYING,— APP. (C.)

1. In respect of minerals under firstly and secondly demised premises the dead or certain rent of £ commencing from . Pp. 276, 287.

2. In respect of the thirdly demised premises the rent of £ for the second year of £ for the third year of £ for the fourth year of £ for the fifth year and of £ for every year during the residue of the said term up to the expiration of the last year thereof.

3. In respect of the fourthly demised premises the rent of £ commencing from .

AND ALSO YIELDING AND PAYING,—

1. In respect of secondly described hereditaments the rent of £ per acre for every acre entered upon and taken under power.

2. In respect of firstly described premises (being the Common) the rent of shillings (until allotment) and of £ (after allotment) per acre for every acre entered upon and taken, etc.

AND ALSO YIELDING AND PAYING [*way-leave rent of pence per ton for every ton raised from other lands*].

AND ALSO YIELDING AND PAYING during the said term hereby granted the rents or royalties following, that is to say:—

1. A rent or royalty of pence for every 2,520 pounds imperial measure (which weight is hereinafter called a ton) of *large coal* obtained from the said demised premises and sold or used off or from or upon the same. Pp. 288 *et seq.*

2. A rent or royalty of pence for every ton of *small coal*, etc.

3. A rent or royalty of pence for every ton of argillaceous and blackband ironstone obtained from the said demised premises and converted into iron thereon.

4. A rent or royalty of pence for every ton of such ironstone obtained from the said demised premises and sold or used off or from the same.

5. A rent or royalty of pence for every ton of fire-clay obtained from the said demised premises and used thereon.

6. A rent or royalty of pence for every ton of fire-clay obtained from the said demised premises and sold or used elsewhere than on the said demised premises.

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7. A rent or royalty of pence for every ton of alluvial clay obtained from the said demised premises and used thereon.

8. A rent or royalty of pence for every ton of alluvial clay obtained from the said demised premises and made into bricks or tiles and sold or used off or from the same.

9. A rent or royalty of pence for every ton of sand obtained from the said demised premises and sold or used elsewhere than on the said demised premises And

10. A rent or royalty of pence for every ton of building stone obtained from the said demised premises and sold or used elsewhere than on the same premises for building dwelling-houses thereon in accordance with these presents.

[*Proviso that no royalty shall be payable for building stone used about the said mines or works.*]

[*Proviso that as to large coal royalty of pence shall be payable on* 2,520 *lbs. and only pence on* 120 *lbs., making together the collier's ton of* 2,640 *lbs.*]

[*Power to supply colliers, etc., with coal, free of royalty.*]

[*No royalty payable for coal used for smithies, pit-head fires, ventilation, or in engines, etc., the consumption being justly apportioned between demised and other minerals.*]

[*Royalties, etc., to be payable half-yearly.*]

Pp. 237, 290.

Provided always and it is hereby further agreed and declared that notwithstanding the reservations hereinbefore contained of the several royalties or rents on coal ironstone fire-clay alluvial clay sand and building stone no such rents or royalties shall be actually paid or payable in any year after the day of unless the aggregate amount of such rents and royalties in that year shall exceed the amount of the dead or certain rent of £ hereinbefore reserved as aforesaid it being the true intent of the parties hereto that in case in any such year of the term hereby granted the amount of the rents and royalties on coal ironstone fire-clay alluvial clay sand and building stone brought to the surface in such year shall fall short of the said dead or certain rent payable for such year the said dead or certain rent only and no such other rents and royalties as last aforesaid shall in that year be actually paid to the lessors under these presents but that in case the same rents or royalties shall in any current year of the term hereby granted exceed the said dead or certain rent payable for such year then so much and no more of the said rents or royalties as shall exceed the amount of the said dead or certain

rent shall in such year be actually paid or payable to the lessors in addition to the said dead or certain rent PROVIDED ALSO and it is hereby further agreed and declared that if in any such year of the said term hereby granted the said E. F. his executors, etc. shall not bring to the surface from or out of the said mines hereby demised such a quantity of coal ironstone fire-clay alluvial clay sand and building stone as shall be sufficient to produce rent or royalties at least equal in amount to the said dead or certain rent then and in such case as often as the same shall happen it shall be lawful for the said E. F. his executors, etc. to bring to the surface in the three then next succeeding years of the said term such quantities of coal ironstone fire-clay alluvial clay sand and building stone as will make up the deficiency occasioned by the short workings of any such preceding year without being liable to and being exempt and free from the payment of any rent or royalty whatsoever for such last-mentioned quantity.

[*Agreement (special) that E. F. shall convert the Common Railway into a gauge of feet and inches and put and keep the same into and in repair and shall then use such railway free from rent and may take specified rates for use thereof by other people for traffic in goods.*]

[*Power for lessee within three months after expiration of term to remove stock of minerals, also engines, etc., fixed by him and usually considered removable unless lessors desirous of purchasing same or any part thereof at a valuation. Proviso that no such removal shall be lawful without a previous offer to the lessors. Power for lessors to deduct any arrears of rent, etc., from the amount to be paid for such engines, etc., if purchased.*] Pp. 263, 264, 265.

[*Covenants by lessee (as in other forms).*]

[*Power of re-entry (as in other forms).*]

PROVIDED ALSO and it is hereby further agreed and declared that in case the said lessee shall be desirous of surrendering and giving up the said demised premises before the expiration of the said term hereby granted and at the end of any complete year thereof and of such his desire shall give to the lessors or to their agent or steward three years' previous notice in writing then and in such case at the expiration of the years mentioned in such notice and upon payment or legal tender of all rents or arrears of rents and sums of money which shall then be due and owing hereunder and on due performance and fulfilment of all and every the covenants conditions and agreements herein contained and on the part of the lessee to be performed and fulfilled the said term Pp. 302, 303.

App. (C.) hereby granted shall cease and determine and these presents shall become utterly void except as to the provisions herein contained still remaining to be performed or observed after the expiration or other determination of the said term or otherwise in accordance with these presents.

[*Covenants by lessors as in other forms, and adding the following special covenant :—*]

Pp. 219 *et seq.* And further that the lessors will at any time or times during the continuance of this demise on the request and at the cost in all things of the said lessee grant and demise unto him for a term co-extensive with the residue for the time being of the term hereby created a part or parts of the aforesaid lands which may be conveniently situated for such purpose as and for building ground on which the said lessee may build cottages or dwelling-houses for the habitation of workmen miners and others engaged in the works connected with the said mines and works the rent to be reserved in each such lease to be £ for each acre of the land to be demised and so in proportion for any greater or less quantity than an acre and the lease to contain all such covenants and provisions as by the counsel of the lessors shall be reasonably advised to be proper under the circumstances.

[*Arbitration clause (as in other forms).*]

No. 13.—Lease of Mines of Lead [and of Copper].

Pp. 273 *et seq.* This indenture made the 1st day of 19 Between [*lessor*] of the one part and [*lessees*] of the other part Witnesseth that in consideration of the rents reservations covenants provisoes and agreements hereinafter contained and on the part of the said [*lessees*] their executors administrators and assigns to be paid observed and performed He the said [*lessor*] (so far as the grant hereinafter contained is not included in or does not interfere with any former or similar grants by the said [*lessor*] or any former owner) doth by these presents grant and demise unto the said [*lessees*] their executors administrators and assigns all [*Describe*
P. 273. *the veins or ground correctly, and, if necessary, by reference to a plan. If a vein be demised, describe* its supposed *direction, the length from a given point, and the breadth intended to be granted, and any other particulars.*] Together with all and singular houses buildings shafts sumps levels drifts works ways waters water-courses privileges and appurtenances to the same now belonging
Pp. 274, 360. or therewith occupied and enjoyed And also together with full

and free liberty for the said [*lessees*] their executors administrators and assigns and their agents and workmen in and upon any lands in which the said mines and premises hereby demised shall be situate (but so far only as the said [*lessor*] may lawfully authorise the said [*lessees*] for this purpose) to dig sink drive make and use all such pits shafts sumps levels watercourses and other works (except for hushing), which may be necessary for winning working and obtaining the lead-ores therein contained and also to appropriate and use such part of the said lands either underground or on the surface as may be proper and requisite as well for depositing and laying down the said ores and placing and heaping the waste refuse and rubbish which may be worked along with them from time to time as for washing and cleansing the said ores and for effectually separating them from all the soil and other substances mixed with them and also for supplying the said mines and works with water or with good and fresh air or for freeing the same from water or foul air and for the purposes aforesaid to erect make and employ all such fire steam water or other engines buildings workmen's houses shops crushing mills sheds or hovels machinery and works which may be proper and reasonable and also with full liberty and power to use and repair any railroads or other roads or ways already made which may lead to the mines and premises hereby demised and to construct repair and use any new railroads or other roads or ways which may from time to time during the continuance of this demise be proper and necessary for the effectual working and management of the said mines and premises hereby demised and also with full liberty at all proper times to enter into the mines hereby excepted with workmen and servants for the purpose of examining the same EXCEPT and always reserved unto the said [*lessor*] his heirs and assigns his and their agents and workmen full and free liberty at all proper and reasonable times during the continuance of this demise to enter into and upon the mines works and premises hereby demised in order to view and examine the condition thereof and for that purpose to make use of any of the railroads or other roads and ways machinery and works belonging to the said mines and premises and also to use or to make and use any drifts levels watercourses adits or passages now being or hereafter to be in or upon any part of the premises hereby demised or the surface thereof for the purpose of freeing any other mines whatsoever from water or for conducting water for the use of any such last-mentioned mines or the machinery or works connected therewith or for supplying the same with good fresh air and also full and free liberty at all times during the continuance of this demise to make any level drift shaft adit

Pp. 253, 275.

App. (C.)

watercourses railroads and other roads or ways in or upon any parts of the premises hereby demised or the surface thereof for effectually winning or working any adjoining mines PROVIDED ALWAYS that the said [*lessor*] his heirs assigns or his or their agents and workmen shall not by any of the means aforesaid obstruct or destroy any of the levels drifts shafts adits watercourses railroads and other roads or ways and works belonging to the said mines and premises hereby demised and in actual use and shall not molest nor delay in the regular and necessary use thereof in the meantime the workmen and servants of the said lessees or lessee for the time being and shall not on any account whatever divert or use for any purposes whatsoever any water which may be from time to time enjoyed with the said mines and premises hereby demised and which may at any time either then or thereafter be only adequate for the proper and effectual working and washing of the mines and minerals hereby demised and shall contribute a fair and proportionate share of the costs and expenses incurred in repairing any parts of such works which may be jointly used by the said [*lessor*] his heirs or assigns and the said lessees or lessee for the time being and shall also from time to time deliver to the said lessees or lessee for the time being their agents or servants all the lead ores which shall be obtained in or upon the said premises hereby demised during any such operations connected with any adjoining mines in their natural and unwashed condition and to be laid upon some part of the said premises for the acceptance of the said lessees or lessee subject to the like render as the ores raised by them or him and shall also in the course of all such last-mentioned operations make from time to time all reasonable satisfaction in damages for any injury which may be sustained by the said lessees or lessee in respect of the said mines works and premises hereby demised PROVIDED ALSO that the said [*lessor*] his heirs or assigns shall not attempt to win or work any of the minerals hereby excepted which shall be immediately connected with the vein or veins hereby demised or with the actual mining works for the time being of the said lessees or lessee without their or his consent in writing first obtained PROVIDED NEVERTHELESS that the said lessees or lessee shall at the request of the said [*lessor*] his heirs or assigns bring out to the surface all such excepted minerals as shall be actually severed by the said lessees or lessee in the course of their or his mining operations without any compensation and shall permit the said [*lessor*] his heirs or assigns at any time afterwards to carry away the same for his and their own benefit

P. 274.

TO HAVE AND TO HOLD the said mines veins and all and singular other the premises hereinbefore mentioned and hereby demised

with their appurtenances except as aforesaid unto the said [*lessees*] their executors administrators and assigns from the 1st day of January now last past for and during the full term of forty-two years from thence next ensuing and fully to be complete and ended RENDERING AND DELIVERING therefor unto the said [*lessor*] his heirs and assigns yearly and every year during the said term one full part or share of all and every the lead-ore to be from time to time produced and obtained by the said lessees or lessee for the time being from or out of the mines and premises hereby demised well and sufficiently washed cleansed and made fit for smelting according to the best and most improved mode practised within the said manor free and clear from all rates taxes and assessments imposed or to be imposed by authority of parliament or otherwise upon the whole or any part of such produce and all other charges and deductions whatsoever relating thereto and to be weighed and delivered in the manner hereinafter mentioned (*). AND the said [*lessees*] do and each of them doth by these presents jointly and severally covenant promise and agree with and to the said [*lessor*] in

Pp. 276, 287.

Pp. 277, 286 *et seq.*

(*) *Variation of reddendum where a money rent is reserved varying or not with value of metal raised:*

RENDERING, etc. for all lead-ore (including the silver therein) to be so produced as aforesaid the yearly sum or sums following (that is to say) when the average yearly market price of smelted pig lead of every kind and quality arising from mines within the counties of and sold at shall amount to the sum of £ sterling for a fother of lead containing twenty-one hundredweight then at the rate of for every bing of lead-ore each containing eight hundredweight produced from the mines hereby demised and made fit for smelting and when such average market price shall exceed the said sum of £ per fother then at the rate aforesaid with a further sum of for every additional sum of £1 by which such price shall so exceed for every such bing and in proportion for any less sum than £1 and when such average price shall be less than the said sum of £ per fother then the said sum of reserved as aforesaid shall be subject to a deduction therefrom of the same amount and in manner last aforesaid AND such sums hereby reserved shall be payable on the 1st day of February in every year and shall be computed in each case with respect to the ores produced in the year immediately preceding and ending on the 1st day of November and with reference to the average market price for such last-mentioned year.

App. (C.) manner following that is to say that they the said [*lessees*] their executors administrators or assigns or their agents or workmen shall and will from time to time and at all times during the said term of forty-two years well and truly render and deliver unto the said [*lessor*] his heirs or assigns his or their agents or servants one full part or share of all and every the lead-ore to be from time to time produced and obtained by the said lessees or lessee for the time being from or out of the said mines and premises hereby demised in manner aforesaid according to the true intent and meaning of these presents And also shall and will well and truly weigh or cause to be weighed upon some part of the said demised premises the whole produce of such ore to be so obtained as aforesaid And also that the weights beams and scales which shall be used upon or near to the premises hereby demised for the weighing of any such produce either in receiving the same from the workmen or in delivering the same for smelting or for sale or by way of reservation as aforesaid or for any other purpose whatsoever shall be either the same or of similar construction size and form and in all respects fair and equal and that the weighing of the said part or share hereinbefore reserved shall be performed at least twice in every year during the said term and as many other times as occasion shall require and that ten days' notice in writing of every weighing of the said part or share shall be given by the said lessees or lessee for the time being or their or his agent to the said [*lessor*] his heirs or assigns or his or their agents in order that he or they may be present at such weighing and attend to the proper conduct thereof And also that no part of the said produce shall on any account whatsoever be taken away from the said demised premises by the said lessees or lessee for the time being their agents or workmen until it shall have been so weighed as aforesaid and until the duty in respect thereof has been so rendered as

P. 293. aforesaid And also that it shall be lawful for the said [*lessor*] his heirs and assigns from time to time to distrain the ores and materials of the said lessees or lessee for the time being in under or upon any part of the premises hereby demised for or in respect of any dues or duties which ought to have been rendered to the said [*lessor*] his heirs or assigns and to weigh the same in the manner hereinbefore mentioned and after deducting his and their fair proportion to leave the same in some part of the said premises for the use of the said lessees or lessee for the time

Pp. 289, 320. being And also that they the said lessees or lessee for the time being their or his agents shall and will once in every year of the said term and at such period in every year as the said [*lessor*] his heirs or assigns his or their agents shall determine make and

deliver unto the said [*lessor*] his heir or assigns his or their agents a full true and just account in writing and signed by the said lessees or lessee for the time being or their or his agent of the quantity of lead-ore yearly washed weighed and produced from the mines and premises hereby demised and also of the quantity of such ore yearly carried away from the said mines and premises either by the said [*lessor*] his heirs or assigns or his or their agents or by any other person whomsoever AND ALSO shall and will at all times during the continuance of this demise prepare and keep a correct and proper plan or section of all the workings and actual condition of the mines and premises hereby demised AND ALSO shall and will at all times during the said term permit and suffer the said [*lessor*] his heirs or assigns and his or their agents to inspect peruse and take copies of or extracts from all and every the books memorandums and accounts which shall be kept at any time during the said term for entering or recording the quantity of ore so raised or so carried away as aforesaid and the said plans or sections AND ALSO that it shall and may be lawful for the said [*lessor*] his heirs or assigns or his or their agents to inspect and take an account in writing from time to time of all the ore which shall be so respectively produced and carried away as aforesaid AND ALSO that they the said lessees or lessee for the time being their and his agents workmen and servants shall and will during the continuance of this demise work and carry on the said mines and premises in a fair orderly skilful and workmanlike manner AND ALSO shall and will for at least nine calendar months in the whole in every year during the continuance of this demise constantly employ during all the usual times and hours of working mines within the said manor in working and carrying on the said mines at least four good able and sufficient miners or workmen unless prevented by some inevitable accident or occurrence AND ALSO that it shall be lawful for the said [*lessor*] his heirs and assigns or his or their agents at all proper and seasonable times during the continuance of this demise and whether the mines are working or not without any interruption or disturbance from the said lessees or lessee for the time being their or his agents workmen or servants to enter into and upon the mines works and premises hereby demised or any part thereof to view and examine the condition thereof and whether the said mine be worked in a proper skilful and workmanlike manner and for such purposes to make use of any of the railroads or other roads or ways machinery and works belonging to the said mines and premises AND ALSO shall not nor will at any time during the said term hush any earth for discovering or obtaining any ore without the

Pp. 267, 289, 370, 445.

Pp. 229, 303 *et seq.*

App. (C.)

express license or consent in writing of the said [*lessor*] his heirs or assigns his or their agent for every such purpose

Pp. 170, 388.

And also shall not nor will at any time during the continuance of this demise place or leave any waste or dead heaps refuse or rubbish which may be brought out of the said mines or premises near to any river brook or channel of water whereby such waste or dead heaps refuse or rubbish may reasonably be supposed to be liable to be disturbed and carried away by floods or other natural causes And also shall not nor will work the said mines hereby demised out of or beyond the limits and boundaries hereinbefore mentioned And also shall and will place upon some convenient part of the said demised premises all such ores and minerals which shall have been worked by the said lessees or lessee for the time being their workmen or servants and which shall belong to any other mine-owners upon and by virtue of any grant similar to these presents in an unwashed condition and permit and suffer such last-mentioned owners their servants

Pp. 42, 286, 315.

and workmen to carry away the same ores and minerals And also shall and will at all times make proper and reasonable compensation to the owners or occupiers of any land in respect of any damages which may be sustained by them during the continuance of this demise by the working of the said mines and the carrying on the said works or in taking away the said ore or by any other

Pp. 434—436.

means connected therewith And also shall and will build and keep in good repair a sufficient and substantial stone wall or other fence round all the pits and shafts which may at any time during the said term be open in any part of the said demised premises or elsewhere for the purposes of this demise so as effectually to prevent all access thereto by all kinds of cattle (except sheep) and when and so often as any such pit or shaft shall be considered by the said [*lessee*] his heirs or assigns or his or their agents and also by the said lessees or lessee for the time being their or his agents to have become entirely unnecessary shall and will either fill up the same with earth or waste heaps or cover the same with a good and sufficient arch of stone And also shall and will at all times hereafter keep harmless and indemnified the said [*lessor*] his heirs and assigns his and their agents and servants of and from all and all manner of suits actions and proceedings which may be instituted against them or any of them for or in respect of any injuries sustained by breach of any of the covenants and provisoes herein contained on the part of the said lessees and all costs

Pp. 264, 305, 315, 321, 328.

charges and expenses in anywise relating thereto And also shall and will at all times during the continuance of this demise keep and preserve the said mines and premises from all unnecessary injury and damage and also all the levels drifts shafts pits sumps

watercourses houses erections sheds washing places buddles and other conveniences railroads and other roads and ways in good order repair and condition except such of the said works as shall from time to time be considered by the said [*lessor*] his heirs or assigns his or their agents to be unnecessary for the further working of the said mine or for any purposes connected with the working of any other mines and in such state and condition shall and will at the end or other sooner determination of the said term deliver peaceable possession thereof and of all and singular the premises hereby demised to the said [*lessor*] his heirs and assigns AND ALSO shall not nor will at any time during the said term sublet or dispose of the said mines and premises hereby demised or any part thereof for less than the whole term hereby granted by way of underlease or other separate interest AND ALSO in case the said mines hereby demised shall at any time during the said term be carried on in copartnership with any other person or persons shall and will on the 1st day of May in every year when so required by the said [*lessor*] his heirs or assigns deliver to him or them or his or their agent a correct list and description in writing of the persons interested therein as such copartners for the time being or as claiming to be copartners therein AND ALSO shall and will in case of any such copartnership as aforesaid procure all the copartners for the time being to enter into and subscribe articles of agreement or rules defining the terms on which such partnership is constituted and in particular containing a stipulation to the effect that in case any call or contribution to be made on any of the said copartners shall remain unpaid for the space of three calendar months from the time of proposed payment the share and interest of such partner so failing may be forfeited and shall and will deliver a copy of all such articles or rules to the said [*lessor*] his heirs or assigns or his or their agent AND ALSO shall and will duly enforce such stipulation to the effect aforesaid against all or any of the partners so failing to pay any such call or contribution PROVIDED ALWAYS that no covenant or clause herein contained shall operate to oblige the said [*lessor*] his heirs or assigns for any of the purposes of these presents to acknowledge any person or persons as interested in the mines and premises hereby demised other than the person or persons for the time being legally entitled thereto under this demise without reference to any equitable claims thereto.

Pp. 293—295.

PROVIDED ALWAYS and it is hereby mutually declared and agreed between and by the parties to these presents that if the said [*lessor*] his heirs or assigns or his or their agents or servants shall after such notice of ten days as aforesaid neglect or refuse to attend and be present at any weighing of the said lead or other

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ore for the purpose of ascertaining the amount of duty ore so payable as aforesaid then and in every such case it shall be lawful for the said lessees or lessee for the time being their or his agents or servants in the presence of two credible and indifferent witnesses to weigh divide and apportion all and every the ore so produced and prepared as aforesaid and to set apart and keep safely on behalf of the said [*lessor*] his heirs and assigns in some convenient part of the premises hereby demised or as near thereto as circumstances will permit the said full share and proportion of the said [*lessor*] his heirs or assigns until the same shall be so removed and carried away by him or them but the said lessees or lessee for the time being their or his agents or workmen shall on no account be responsible for the safe custody of the said part or share for more than six calendar months.

Provided also and it is hereby further declared and agreed that the said [*lessor*] his heirs or assigns shall upon the determination of the said term and within six months afterwards have the option of purchasing all or any parts of the engines machinery mining tools and instruments and other articles belonging to the said mines and premises hereby demised and which are legally removable by a tenant at a valuation to be made

Pp. 263—265.

in the manner hereinafter mentioned And if the said [*lessor*] his heirs or assigns shall within such period as aforesaid decline or neglect to purchase all or any part of such engines machinery tools instruments and articles as aforesaid then that it shall be lawful for them the said lessees or lessee for the time being within twelve calendar months next after the determination of the said term to remove take up and carry away the same for their own use and benefit without any claim or disturbance by the said [*lessor*] his heirs or assigns And also that upon such determination as aforesaid it shall be lawful for the said lessees or lessee for the time being within the space of twelve months then next ensuing to wash crush and remove and take away the ores which shall have been produced by them or him during any part of the said term upon rendering to the said [*lessor*] his heirs and assigns the full amount of his or their dues in the manner hereinbefore mentioned.

Pp. 234, 278, 310.

Provided also and it is hereby expressly agreed and declared that if the said lessees or lessee for the time being shall at any time during the continuance of this demise refuse or neglect to observe and perform all or any of the conditions covenants and provisoes hereinbefore on their parts contained then and in any such case the said term hereby granted shall cease determine and be void anything herein contained to the contrary thereof in any wise notwithstanding and it shall be lawful for the said [*lessor*] his heirs assigns or his or their agents to enter forthwith

into and upon the said demised premises and the same to repossess and enjoy as fully and effectually as if these presents had not been made and executed without prejudice to the right of the said [*lessor*] to enforce payment of any rent then due or the performance of any covenants which shall be then broken or unperformed or to be performed after the expiration of the said term.

AND the said [*lessor*] hereby doth covenant promise and agree with and to the said [*lessees*] in manner following that is to say that for and notwithstanding any act deed matter or thing whatsoever by him the said [*lessor*] made done omitted committed or knowingly or wilfully suffered to the contrary he the said [*lessor*] now hath in himself good right full power and authority to grant and demise the said mines and premises hereby demised with their appurtenances in manner aforesaid according to the true intent and meaning of these presents (save and except only in respect of any former grants which may have been at any time heretofore made of the said mines and premises or any part thereof for any of the purposes hereinbefore mentioned) AND that it shall be lawful for the said lessees or lessee for the time being at all times hereafter during the continuance of this demise paying and performing the rents reservations covenants provisoes and agreements hereinbefore on their part respectively contained peaceably and quietly to possess and enjoy the same mines and premises with their appurtenances and to work and carry on the same in the manner hereinbefore mentioned for their own use and benefit without any disturbance claim or demand whatever from or by him the said [*lessor*] or his heirs or any persons lawfully claiming through or in trust for him them or any of them AND that free and clear and well and sufficiently defended and indemnified by the said [*lessor*] his heirs executors and administrators from and against all other estates titles debts and incumbrances whatsoever either already or to be hereafter made occasioned or suffered by the said [*lessor*] or his heirs or any other persons lawfully claiming or to claim as aforesaid (save and except as aforesaid) AND FURTHER that the said [*lessor*] and his heirs and all other persons having or claiming or who shall or may hereafter have or claim any estate or interest in the said mines and premises hereby demised or any part thereof under or in trust for him the said [*lessor*] or his heirs (except as aforesaid shall and will in the events aforesaid from time to time and at all times hereafter upon every reasonable request and at the proper costs and charges of the said lessees or lessee for the time being make do and execute or cause to be made done or executed all such other lawful and reasonable acts deeds things conveyances

Pp. 277, 281, 311, 323.

P. 323.

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and assurances in the law whatsoever for the further better and more perfectly granting and demising the said mines and premises with their appurtenances in manner aforesaid according to the true intent and meaning of these presents as by the said lessees or lessee for the time being or their or his counsel in the law shall be reasonably advised or required.

Pp. 442 *et seq.*

PROVIDED LASTLY that if at any time during the said term or after the determination thereof any doubt dispute or difference shall arise between the said [*lessor*] his heirs or assigns and the said lessees or lessee for the time being concerning any of the clauses covenants and agreements herein contained or in anywise relating thereto or any valuation to be made as aforesaid or any other matter or thing whatsoever relating to the said mines and premises then and in all such cases such doubt dispute or difference shall be referred to the award or arbitration of such two persons as shall be nominated or appointed for that purpose by the parties in difference one of the said arbitrators to be named by the said [*lessor*] his heirs or assigns and the other of them by the said lessees or lessee for the time being and such arbitrators shall with all convenient speed proceed to the determination and settlement of the matters in dispute and shall either immediately appoint some third person to act as umpire in case of ultimate difference between them or to act immediately in conjunction with them and such matters shall be decided from time to time by a majority or shall appoint such third person when and in case such ultimate difference shall arise and every such arbitration shall then proceed and be conducted in accordance with the enactments of the Arbitration Act, 1889, in such cases made and provided or any subsisting statutory modification thereof or substitute therefor and the costs of any such arbitration and of the award of all expenses incidental thereto shall be in the discretion of the person or persons making such award.

IN WITNESS, etc.

No. 14.—Lease of Salt Mine [Cheshire].

Pp. 273 *et seq.*

THIS INDENTURE, etc. BETWEEN A. B. etc. (hereinafter called the lessor) of the one part and The Company Limited (hereinafter called the lessees) of the other part WITNESSETH that in consideration of the rents and royalties hereinafter reserved and of the covenants and agreements by the lessees hereinafter contained the lessor doth hereby demise and grant

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unto the lessees their successors and assigns ALL THAT parcel of land situate in the parish of in the county of Chester

containing or thereabouts abutting upon a river there called the river and delineated on the plan drawn in the margin of these presents and thereon coloured AND ALSO all mines of rock-salt and springs of brine in and under the said parcel of land hereinbefore described and expressed to be hereby demised and in and under the several parcels of land adjoining thereto known by the several names of the etc. containing in the whole and delineated on the said plan and thereon coloured TOGETHER with all rights easements and appurtenances to the said parcel of land and mines and springs belonging or reputed to belong or with the same usually held or enjoyed TOGETHER ALSO with liberty for the lessees their successors and assigns and their agents and workmen upon in and under the first-mentioned parcel of land and also upon in and under the said several parcels of land coloured upon the said plan to search for dig and get rock-salt and brine and to sink dig and make all such brine and other pits shafts and drifts and to erect and set up all such engines machinery salt-houses salt-pans brine-pans storehouses and other buildings boilers furnaces apparatus and things as shall be necessary or convenient for getting and obtaining rock-salt and brine and manufacturing the same into salt and preserving keeping selling and disposing of the same and carrying on the works connected therewith AND ALSO for the purposes aforesaid to erect upon the said parcel of land coloured on the said plan but not elsewhere such cottages or dwelling-houses for the use of the workmen and persons employed in the salt-works to be established under or by virtue of these presents but for no other persons or purposes as the lessees their successors or assigns shall think proper TOGETHER ALSO with liberty for the lessees their successors and assigns to make such quays and wharfs adjoining or fronting the said river in or upon the said parcel of land coloured on the said plan but not elsewhere as they shall think expedient for the purposes of the said salt-works and of loading and unloading rock and other salt coals and other things necessary or convenient to be used for the purposes of the said works but for no other purpose and to do all such other things as shall be necessary or convenient for the purpose of enabling them effectually to carry on the said works EXCEPT and reserving unto the lessor his heirs and assigns all mines quarries veins and beds of coal cannel lead stone flag and other minerals in or upon any part of the said lands coloured and on the said plan And also all timber and other trees now or at any time during the term intended to be hereby granted being upon the said lands coloured and on the said plan with liberty for him and them and all persons

P p. 274, 360.

Pp. 253, 275.

App. (C.)

authorised or employed by him or them to enter upon the said premises to search for dig make marketable and carry away the said excepted mines quarries veins and beds of coal cannel lead stone flag and other minerals and to mark fell and carry away the said excepted timber and other trees he and they in the exercise of the said excepted liberties doing as little damage as may be and not unnecessarily interfering with the liberties hereinbefore expressed to be hereby granted. To

P. 275.

HAVE AND TO HOLD the premises hereinbefore expressed to be hereby demised and granted unto the lessees their successors and assigns for the term of years from the day of

Pp. 276, 287.

19 YIELDING AND PAYING therefor during the said term the yearly rent of £ by equal quarterly payments on the day of the day of the day of and the day of in every year for and in respect of the said parcel of land coloured on the said plan and tons of rock and other salt raised gotten or manufactured under or by virtue of these presents whether such quantity shall be raised gotten or manufactured or not the first quarterly payment to be made on the day of 19 AND ALSO YIELDING AND PAYING by like quarterly payments the additional yearly rent of £ for every acre (and so in proportion for any less quantity) of the said lands coloured on the plan which the lessees their successors or assigns shall under the liberties hereinbefore granted enter upon and use for the purposes of the said works the first quarterly payment or a proportionate part of the said additional rent to be made on such of the said quarterly days of payment as shall happen next after such entry and the said rent to continue payable during the residue of the said term or until the quarterly day of payment which shall happen next after the land so entered upon shall have been restored and made fit for cultivation and fenced off from the said works to the satisfaction in writing of the lessor his heirs or assigns or his or their agents AND ALSO YIELDING AND PAYING the royalty of for every ton (over and above the said quantity of tons) of rock and other salt which shall during the said term be raised gotten or manufactured out of or upon the said premises the said royalty to be paid on such of the said quarterly days of payment as shall from time to time happen next after the said rock and other salt shall have been raised gotten or manufactured the said several rents or royalties to be paid clear of all deductions PROVIDED

Pp. 237, 290.

ALWAYS and it is hereby agreed and declared that if in any year or years of the said term the lessees their successors or assigns shall not actually raise get or manufacture out of or on the said premises the said quantity of tons of rock and other salt

they may when and so often as such deficiency shall happen raise get and manufacture out of or on the said premises in any subsequent year or years of the said term a sufficient quantity of the said rock and other salt to make up the deficiency without paying any rent or royalties on the same except the said yearly rents.

[*Power of distress.*]

Covenants by the lessees—

1. [*To pay rents and royalty.*]
2. [*To pay taxes, etc.*]
3. AND ALSO will throughout the said term in the best and most effectual manner and without interruption except when prevented by inevitable accident or during the execution of repairs work the said mines so as to raise and get or manufacture therefrom at least tons of rock and other salt in each year.
4. AND ALSO will in working the said mines leave therein such pillars not more than yards apart as shall be necessary for supporting the roof thereof.
5. AND ALSO will throughout the said term effectually drain the said mines or pump out all water and brine likely to cause injury thereto.
6. AND ALSO will throughout the said term at their own expense repair and keep all buildings erections engines machinery salthouses salt-pans brine-pans storehouses boilers furnaces apparatus shafts pits drifts and other things in and about the said works and other the premises in good and sufficient repair and condition.
7. [*To permit the lessor to enter to examine the workings.*]
8. [*To keep proper books of account on the premises.*]
9. [*And permit the lessor and his agent to inspect them.*]
10. [*And on request to furnish him with quarterly accounts.*]
11. AND ALSO will not at any time during the said term remove from the said premises any rock or other salt until the weight and quantity thereof shall have been correctly ascertained and entered in the said books of account and will not remove any brine therefrom in its unmanufactured state.
12. [*Not to assign or underlet without license.*]

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Pp. 263—265.

13. And also will at the expiration or sooner determination of the said term deliver up to the lessor his heirs or assigns the said premises together with all fixtures and additions thereto and all erections buildings pits shafts drifts salthouses salt-pans brine-pans engines machinery boilers furnaces apparatus and things used in or about the said works (except trade buildings fixtures and things which tenants are by law entitled to remove and which the lessor his heirs or assigns shall not under the power hereinafter contained have required to be left) in such good and sufficient repair as aforesaid and in all respects in such state and condition as shall be consistent with the due performance the several covenants hereinbefore contained.

14. [*Power for lessor to take machinery or part thereof at a valuation.*]

Pp. 300—303.

15. Provided always and it is hereby agreed and declared that if at any time during the said term the said mines of rock-salt and springs of brine shall be so exhausted as that they shall not when effectually worked under the provisions of these presents produce the full quantity of tons per annum except the same shall happen on account of the acts neglect or default of the lessees their successors or assigns or if by reason of any inevitable accident it shall become impossible to work the said mines and springs then and in such case it shall be lawful for the lessees their successors or assigns giving to the lessor his heirs or assigns or leaving at his or their usual or last known place of abode in England six calendar months' previous notice in writing stating that the mines are so exhausted or incapable of being worked, and furnishing to him or them reasonable evidence of the same and paying the rents and royalties due or to grow due up to the end of the year happening at or next after the expiration of the said notice and performing and observing all and every the covenants and agreements by the lessees herein contained up to the same period to surrender the said premises unto the lessor his heirs or assigns who shall thereupon accept such surrender.

16. [*Proviso for re-entry.*]

17. [*Covenant by the lessor for quiet enjoyment.*]

18. [*Arbitration clause.*]

In witness, etc.

No. 15.—Lease of Brickfield. APP. (C.)

THIS INDENTURE, etc. BETWEEN A. B. etc. (hereinafter called the lessor) of the one part and C. D. etc. (hereinafter called the lessee) of the other part WITNESSETH that in consideration, etc. the said lessor doth hereby demise and lease and also appoint by way of demise and lease unto the lessee his executors, etc. ALL that [*parcels*] TOGETHER with liberty for the lessee his executors administrators and assigns and his and their agents workmen and servants to get and work the common brick-clay and the sand chalk and other materials used in the manufacture of bricks in or under the said piece or parcel of land and premises AND for that purpose to exercise the following rights, that is to say— Pp. 273 *et seq.*

1. [*To sink pits, etc.*]
2. [*To convert clay, etc., into bricks.*]
3. [*To sell and dispose of bricks.*]
4. [*To set up and maintain, etc., machinery, etc.*]

EXCEPTING NEVERTHELESS out of this demise all mines and minerals [*other than the brick materials*] AND ALSO excepting or reserving unto the said lessor his heirs, etc. [*the reversioner or reversioners for the time being upon the now creating lease*] liberty of ingress egress and regress for working excepted minerals and without compensation TO HAVE AND TO HOLD the premises [*for the term agreed on*] YIELDING AND PAYING [*the certain rent of £ in respect of a specified number of bricks on the specified days*] AND ALSO YIELDING AND PAYING [*an apportioned part of same if necessary*] AND ALSO YIELDING AND PAYING unto the reversioner or reversioners for the time being upon the now creating lease over and above the said certain yearly rent the further rent or royalty of *s.* *d.* for every thousand bricks manufactured on the said premises over and above the said quantity of in respect whereof the said certain rent is hereinbefore reserved the said further rent or royalty to be payable on such of the said half-yearly days hereinbefore mentioned as shall happen in any year next after the said bricks shall have been burnt ready for delivery or in case of re-entry by the said reversioner or reversioners under the proviso in that behalf hereinafter contained on the day of such re-entry PROVIDED ALSO [*making up short workings*] AND the lessee for himself, etc. covenants as follows:—

1. [*To pay rents and also taxes, etc.*]
2. AND THAT in case any existing or future taxes rates assessments or outgoings of any description for the time

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being payable by the landlord in respect of the said premises shall be increased in amount by reason of the said premises being used for the manufacture of bricks or otherwise by reason of any acts of the lessee his executors, etc. he or they will throughout the said term pay the amount or respective amounts by which the same taxes, etc. or any of them may from time to time be increased as aforesaid.

3. [*To indemnify the lessor from rates, etc.*]

4. [*To fence off the land as a brickfield.*]

5. [*To convert clay into bricks only.*]

6. [*To manufacture bricks on the premises only.*]

7. [*To keep accounts and produce same together with vouchers and to give copies.*]

8. [*To permit entry and inspection.*]

Pp. 326 *et seq.*

9. And also will keep the reversioner and reversioners for the time being upon the said lease and his or their heirs, etc. indemnified of from and against all actions suits, etc. which may be instituted or occasioned in respect or by reason of the manufacture of bricks upon the said premises or any act or thing incidental thereto and in respect or by reason of any damage which may be occasioned thereby to the neighbourhood or the adjacent property or otherwise howsoever.

10. [*To deliver up at end of term.*]

Pp. 293, 297.

Provided always and it is hereby agreed and declared that if and whenever any part of the said several rents or royalties hereby reserved shall be in arrear for days whether the same shall have been legally demanded or not the reversioner or reversioners may enter upon the said premises and not only stop all the horses and other animals carts wains waggons and carriages and the persons leading and conducting the same from leading and carrying and conveying any clay sand chalk bricks or other materials brought burnt or manufactured out of or at the same premises but also seize distrain sell and dispose of the clay sand chalk bricks or other materials brought burnt or manufactured or to be brought burnt or manufactured out of or at the same premises and then being thereon and the horses and other animals carts wains waggons engines gins implements rollers ropes and other utensils and materials belonging to and used or provided for carrying on the said manufacture for payment and satisfaction of all such rents and royalties as shall be then due together with

the full costs and expenses to be occasioned by any such distress and sale rendering upon demand the overplus if any to the owner or owners of the cattle goods and chattels so distrained and sold PROVIDED ALSO and these presents are upon this express condition that if and whenever any part of the said rents or royalties shall be in arrear for days whether the same shall have been legally demanded or not or if and whenever there shall be any breach of the covenants and agreements by the lessee herein contained the said reversioner or reversioners may re-enter upon any part of the said premises in name of the whole and thereupon the said term of years shall absolutely determine.

Pp. 234, 278, 310.

And the lessor for himself, etc. covenants as follows :—

1. [*For quiet enjoyment.*]
2. [*To pay ordinary landlord's taxes.*]
3. AND ALSO will permit the lessee his executors, etc. at any time or times within three calendar months next after the expiration or other sooner determination of the said term to take carry away and enjoy to his or their own use all such bricks as shall then have been burnt ready for delivery and deposited upon the same premises he or they having first paid and discharged the said rents and royalties hereinbefore reserved and having performed and observed all and singular the covenants by the lessee hereinbefore contained.

IN WITNESS, etc.

No. 16.—Lease of Lime Quarries, etc.

THIS INDENTURE, etc. BETWEEN A. B. etc. (hereinafter called the lessor) of the one part and C. D. etc. (hereinafter called the lessee) of the other part WITNESSETH that in consideration, etc. he the lessor doth hereby demise unto the lessee his executors, etc. all the quarries delphs pits and beds of limestone spar and other minerals of every description within or under such of the lands belonging to the lessor in the parish of and county of as are delineated on the plan, etc. TOGETHER with liberty for the lessee his executors, etc. to search for dig work and get all such limestone spar and other minerals within or from the said lands and quarries and to erect and set up in or upon the same such buildings (including dwelling-houses which however are to be erected on such sites only as shall be approved of in writing by the lessor his heirs, etc. and are to be inhabited exclusively by

Pp. 273 *et seq.*

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workmen, etc. employed in the said quarries and the works connected therewith) and also such kilns engines and machines and to make use of such other means as shall be found necessary or expedient for better and more effectually getting and raising such limestone spar or other minerals and working the several quarries delphs and pits and carrying on the business connected therewith and for burning converting and making such limestone into lime

Pp. 151, 230, 366.

AND ALSO to lay place and stack the said limestone spar and other minerals and all such earth stones and rubbish as shall be gotten thrown up or collected in carrying on the works hereby authorised as conveniently as may be and as is reasonably done or practised in such or the like cases and to convert to and for his and their own use all such limestone lime spar and other minerals as shall

Pp. 41, 236 *et seq.*, 275, 366.

be gotten raised or made AND ALSO to make such waggon-ways or railways and approaches to the said quarries delphs pits and lands (particularly a railway through and over the lands coloured on the said plan and by means thereof to communicate with the railway at or near a place called as now marked out which is intended to be made if it shall appear to be prudent and advantageous so to do) as shall be necessary and to do all reasonable acts and things necessary or proper for carrying away the said limestone lime spar and other minerals AND ALSO liberty of ingress egress and regress in to out of and from the said quarries delphs pits or lands with horses carts waggons and other carriages or otherwise as shall be necessary for conveying carrying away selling and disposing of the said limestone lime spar and other minerals AND ALSO to make and construct one or more wharf or wharves for the deposit of coals and other things for the use of the said lime works or for the sale of such coals or other things with the privilege of carrying and conveying the same coals over and along all such roads and ways to and from such wharf or wharves AND ALSO as far as the lessor is entitled thereto and can demise or grant the same the use of a certain sough or level called sough for the better enabling of the lessee his executors administrators and assigns to get and raise the said limestone spar and other minerals TOGETHER with all rights easements and appurtenances to the said quarries delphs pits and lands belonging or usually enjoyed therewith EXCEPT

Pp. 253, 275.

AND RESERVING unto the lessor his heirs and assigns and his and their servants tenants and friends liberty of passing and repassing at all reasonable times through across or along the ways and roads now made or hereafter to be made throughout the said lands in pursuance of the liberties hereby granted (except along the line or lines of any such railway or railways) with horses cattle carts or carriages AND ALSO for the lessor his heirs and

assigns and his and their agents or workmen to enter into and upon all or any part of the said quarries delphs pits and lands at reasonable times in the daytime to inspect the state and condition thereof as hereinafter is mentioned TO HAVE AND TO HOLD the premises hereinbefore expressed to be hereby demised and granted unto the lessee his executors administrators and assigns for the term of years from the day of 19 YIELDING AND PAYING therefor during the said term the certain yearly rent of £ by equal half-yearly payments on the day of and the day of in respect of the quantity of tons of limestone spar and other minerals (except lead-ore) gotten raised or obtained from the said quarries and lands and sold and removed therefrom or converted into lime or otherwise converted or manufactured for sale whether such quantity shall be yearly gotten raised obtained and sold or removed or converted or manufactured or not the first of such half-yearly payments to be made on the day of 19 AND ALSO YIELDING AND PAYING by like half-yearly payments during the said term the further rent of £ for every acre (and so in proportion for a less quantity) of the said lands which shall be taken or used by the lessee his executors administrators or assigns under or by virtue of these presents (except the lands actually destroyed or made waste by getting and taking the limestone spar and other minerals therefrom) the first of such last-mentioned half-yearly payments to be made on such of the said half-yearly days of payment as shall happen next after such taking or user AND ALSO YIELDING AND PAYING during the said term by like half-yearly payments the royalty of for every ton (over and above the said quantity of tons) of limestone spar and other minerals (except lead-ore) gotten raised obtained and sold or removed or converted or manufactured as aforesaid in any year the said last-mentioned payments to be made on such of the said half-yearly days of payment as shall happen next after the time when the said limestone spar and other minerals (except lead-ore) shall have been sold or removed or converted or manufactured as aforesaid AND ALSO rendering and delivering on the said premises during the said term unto the lessor his heirs or assigns or his or their agent or agents for his or their own use immediately after any lead-ore raised or gotten from or out of the said lands by virtue of these presents shall have been weighed or measured and before the same shall have been removed one-sixth part of all such lead-ore when made merchantable and fit for smelting and refining clear of all expenses attending the raising getting and making merchantable the same THE said several rents royalties and renders to be paid and rendered clear of deductions except for land-tax.

P. 275.

Pp. 276, 287.

Pp. 276, 298 *et seq.*, 476 *et seq.*

App. (C.) [*Power of distress.*]

Pp. 286 *et seq.* Covenants by the lessee—

1. [*To pay rents and royalties.*]
2. [*To pay taxes.*]
3. [*To keep books of account.*]
4. [*To deliver abstract of accounts to lessor every three months.*]
5. [*To permit lessor to take copies.*]
6. [*To repair.*]

Pp. 19, 262, 336.

7. And also will before sinking opening or making any pit shaft or quarry or opening any railway road or way under the liberties aforesaid remove the soil to the depth of ten inches at least and lay the same in some convenient place near thereto and either preserve and keep the same for the purpose of being again laid thereon when any such pits shafts or openings shall be filled up or the said railways roads or ways become useless or permit the lessor his heirs or assigns to remove or take such soil away or otherwise dispose thereof as he or they shall think proper.

Pp. 434—436.

8. And also will throughout the said term at the like expense fence and guard all the quarries pits shafts openings railways and other roads and ways now made or hereafter to be made under or by virtue of these presents.
9. [*To work the quarries in a workmanlike manner.*]
10. [*To permit the lessor to enter and inspect.*]
11. [*And to stop the works if not carried on properly.*]
12. [*And to rectify improper workings if the lessee fail to do so.*]
13. And also will during the said term do as little damage or injury to the timber or other trees or to the fences upon any part of the said lands as the nature of the the works will reasonably admit of and if and whenever any of the fences shall be unavoidably injured or destroyed will at the like expense amend and replace the same in a proper and workmanlike manner to the satisfaction of the lessor his heirs or assigns or his or their agent.

14. AND ALSO will during the said term commit and do as little trespass injury and damage as may be to the tenants and occupiers of the said lands by the exercise of the liberties hereby granted.

15. AND ALSO will over and above the said rents or royalties hereinbefore reserved pay on the day of in each year to the occupiers of the said lands the sum of £ for every acre (and so in proportion for any less quantity) of land that shall be trespassed upon injured or damaged by the works aforesaid other than and except such lands as may be properly taken or used for any roads or ways or for the erection of buildings or for the actual winning and getting of the said limestone spar and other minerals and continue such payments until the lands so trespassed upon injured or damaged shall have been made good again and put into a proper state and condition.

16. AND ALSO will make full satisfaction to the occupiers of such lands as aforesaid for all such loss injury or damage as shall be sustained by them by reason of their horses cattle or sheep falling into or getting upon the said quarries pits shafts openings railways roads or ways or otherwise by the neglect or default of the lessee his executors administrators or assigns or his or their agents servants or workmen immediately after such loss injury or damage shall happen the amount thereof to be ascertained by two indifferent persons as arbitrators one to be chosen by the occupiers so injured or damaged as aforesaid and the other by the lessee his executors administrators or assigns or by an umpire to be appointed by the said arbitrators before entering upon the reference. Pp. 42, 286, 315.

17. AND ALSO will permit the lessor his heirs and assigns and his and their tenants servants and labourers to pass and repass across and over any railway or railways and along over and across any other roads or ways whatsoever leading to and from the said quarries works and premises or any part thereof with or without horses cattle carts waggons or other carriages (but not with horses cattle carts or carriages along the line of any railway to be made as aforesaid) so as in such passing and repassing he and they do not unnecessarily disturb or interrupt the lessee his executors administrators or assigns in the reasonable use and

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enjoyment of the liberties hereby granted and do as little damage as may be to the said railways roads and ways.

Pp. 314 *et seq.*

18. And also will during the said term whenever thereunto required by the lessor his heirs or assigns or his or their agent or agents convey and carry along the said line of railway so intended to be made as aforesaid if the same shall be so made to the said Railway all gritstone gotten or raised from any parts of the estates of the lessor his heirs or his assigns adjoining or in the neighbourhood of the said railway on being paid the sum of per ton for the conveyance or carriage of the same and will not at any time or times during the said term convey or carry or permit to be conveyed or carried any other gritstone upon or along the said railway except such as shall be gotten or raised under or by virtue of these presents.

19. [*And to deliver up at the end of the term.*]

[*Proviso for re-entry.*]

Covenants by the lessor—

[*For quiet enjoyment.*]

[*And to pay land tax.*]

[*Power for the lessee to determine the term at the end of any year on giving six months' notice.*]

[*Arbitration clause.*]

In witness, etc.

No. 17.—Demise of Undivided Moiety of Coal, and of Ironstone contiguous to Coal, and of Fire-clay, etc. [South Wales].

Pp. 31, 32, 273 *et seq.*

This indenture made, etc. Between A. B. and C. D. etc. (hereinafter called the lessors) of the one part and E. F. etc. (hereinafter called the lessee) of the other part Witnesseth that pursuant to and in exercise of [*leasing powers*] and in consideration etc. They the said lessors do hereby limit and appoint and also grant demise and lease unto the said lessee all that one undivided moiety or half-part (the whole into two equal parts being considered as divided) belonging to the said lessors or which they have power to demise of and in all and every the mines veins seams and beds (hereinafter called the said demised mines) of coal and of such iron-stone as may be found in working the coal

but not otherwise and also of fire-clay and building-stone (hereinafter called the said demised minerals) now open or discovered or which during the continuance of the term hereby granted shall or may be found or discovered within or under all those lands tenements, etc. [*surface descriptions*] situate, etc. (hereinafter called the said surface lands) TOGETHER with full and free liberty power and authority (so far as the said lessors have power to grant the same but not further or otherwise) to and for the said lessee or his agents, etc.

[*To work and win mines.*]

[*To make use of ground room and heap room.*]

[*To carry away minerals over surface.*]

[*To make watercourses, railways, etc.*]

[*To erect buildings.*]

[*To communicate with adjoining collieries.*]

BUT so nevertheless that in the exercise of the several liberties licenses powers and authorities hereby given and granted as aforesaid as little damage and injury as is practicable consistently with the full exercise and enjoyment of the several rights and powers hereby granted may be done to the said surface lands and so that no damage or injury be done to any buildings or works now upon such lands and the said lessee paying all surface and other rents payable in respect of the same and making compensation as hereinafter mentioned for any damage or injury which may be done thereby and indemnifying the said lessors from and against or in respect of such rents and compensation or any part thereof respectively EXCEPTING always and reserving unto the said lessors and also to their other lessees and tenants full right and power in common with the said lessee so far as that right and power are hereby conferred on him but not further or otherwise of getting working and taking away all such building stones alluvial clay and sand as they respectively may think proper and be entitled to from the said surface lands and the said demised mines or any part or share thereof and also of constructing such roads or ways or any other works as may be necessary or expedient but so that in the exercise of the reservations and powers aforesaid the person or persons exercising the same shall not interfere with the workings of the said lessee more than may be absolutely necessary AND ALSO excepting and reserving unto the said lessors and their other tenants, etc. free liberty and authority during the continuance of the term hereby granted with or without engines horses carts waggons and other carriages to pass and go along and across the roads

Pp. 41, 253, 275.

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waggon-ways tramways railways watercourses and bridges which may be used or constructed on the same lands under the powers hereby granted at such times as they respectively may think proper for any purpose whatsoever connected with or in any manner necessary for the use enjoyment and occupation of the mines and minerals hereby reserved or any part thereof And also for any other purpose whatsoever they paying reasonable compensation for the use thereof and doing as little injury and causing as little obstruction as practicable to the property or works of the said lessee within the limits of the said surface lands And also excepting and reserving unto the said lessors and their lessees at all times during the continuance of the term hereby granted free ingress egress and regress into and from the said demised mines and the pits in connection therewith for the purpose of working getting raising carrying away and selling all minerals and substances therein belonging to them (other than such as are hereby expressly demised) as well as the products and refuse thereof and also any building stones and surface clay or for letting the same or making communications with other lands mines or workings relative thereto And for any of the purposes last aforesaid to make use of and deepen all or any of the pits and shafts which have been or which from time to time may be made or sunk on the said surface lands and to extend and use any of the roads waggons-ways railways or other ways from time to time made laid or used by the said lessee by virtue of these presents and with power in the exercise and enjoyment of the last-mentioned powers and privileges to use and employ all or any of the engines machines machinery waggons ropes rollers and implements whatsoever from time to time used erected made or placed by the said lessee in upon under or about the said surface lands or demised mines but so nevertheless that the person or persons using and employing the same or any of them shall make a fair compensation for the use thereof to the said lessee and shall do as little injury and cause as little obstruction and inconvenience as practicable to the property or works of the said lessee and so also that the underground communications and workings of the said lessors and their other tenants shall as far as practicable be separate and distinct from the workings of the said lessee To have and to hold, etc.

[*Reservation of certain and uncertain rents (as in other forms).*]

[*Definition of large and small coal.*]

[*Royalties payable only for excess over rents.*]

[*Average clause as to making up short workings.*]

PROVIDED ALSO and it is hereby further agreed and declared that although in the process of working the said demised minerals there may be (by arrangement between the lessee and his workmen or according to custom or by breakage or otherwise) sent out in trams or tubs containing or supposed to contain large coal a portion of small coal stone shale rubbish or refuse or in the trams or tubs containing or supposed to contain small coal a portion of stone shale rubbish or refuse the royalty hereinbefore reserved on large coal shall always be payable upon every 2,520 lbs. out of every 2,640 lbs. of what may be sent out under the denomination of large coal and the royalty hereinbefore reserved on small coal on the remaining 120 lbs. thereof and the royalty hereinbefore reserved on small coal shall always be payable upon the gross and entire quantity of what may be sent out under the denomination of small coal whatever may be the nature or quality of any of the substances contained in the several trams or tubs it being the intention of the parties hereto that the said lessee shall not for any cause or upon any pretence whatever be entitled to any further or other abatement of royalty or allowance in weight either in respect of breakage or arrangement or custom in the quantity of the coal so sent out.

Pp. 289 *et seq.* 298 *et seq.*

[*Coal used on the works and in the miners' houses to be free of royalty.*]

[*Building stones used on the premises to be free of royalty.*]

[*Power in lessee to determine lease in usual form or (if required) made conditional upon (among other and more usual things) any special work being completed or special event happening.*]

[*Power of inspection in lessors.*]

[*Power for lessee to remove removable plant, subject to lessors' option to purchase, and right (in that event) to set off arrears of rent (if any) against purchase-money.*]

Lessee's covenants (*) [*as in other forms*].

[*Power of entry and distress.*]

[*Proviso for re-entry.*]

Lessors' covenants [*as in other forms*].

IN WITNESS, etc.

(*) The following form of special covenant as to mode of working is in use:—

AND ALSO that the said lessee shall and will at all times during the continuance of the term hereby granted work manage conduct

Pp 229, 303 *et seq.*

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use and carry on the mines and premises demised hereby [and by the said lease to be granted by the lessors of the other undivided moiety] and all works and workings connected therewith uninterruptedly (except only in the case of strikes of workmen employed in or of accident to the mines or other inevitable cause of interruption) and also efficiently regularly and properly and according to the best and most improved method of working and using similar mines practised in the district of [South Wales] for the time being and so as to clear out work and raise and bring to bank the largest possible quantity of the demised minerals in the best possible condition And also shall and will work and clear out the coal lying to the dip of the pits simultaneously with and in equal quantities as near as may be to that lying to the rise thereof and will not allow any water to accumulate in or to the dip workings until all the demised coal is exhausted therefrom nor afterwards in case any such accumulation may tend to endanger impede or obstruct the working of any underlying or unworked minerals And also that the said lessee shall and will bring to bank and weigh all marketable small coal that may be made or obtained in the demised mines and is capable of being either sold or used and will not leave any of such small coal in the workings or permit the same to be gobbed or stowed underground and in default of so doing will pay to the said lessors as and by way of rent (and with the like remedies for recovery by distress or otherwise as if the same were rent or royalty hereby reserved) a royalty thereon equivalent to what would have been payable to the said lessors thereon or in respect thereof in case the same had actually been brought out of the demised mines and which last-mentioned payment (if and when made) shall be accepted by the said lessors in full satisfaction of the covenant lastly hereinbefore contained to bring all such small coal to bank And also shall not nor will during the term hereby granted discontinue or neglect to work the said demised mines regularly and efficiently as aforesaid for a longer period than three calendar months at any one time unless compelled so to do by some unavoidable accident or strike of workmen employed thereat and in case of any such accident or strike the said lessee shall and will use his best endeavours to provide against any bad consequences therefrom and shall and will resume the working of the demised mines as soon as possible And if in the working of the same mines any fault or dislocation shall at any time be discovered the said lessee shall and will before abandoning the workings at such fault or dislocation give to the said lessors or their agent one month's previous notice of his intention to discontinue such workings and shall (if so

Pp. 303 *et seq.*

requested by the said lessors) at his own expense drive trial headings or drifts through such faults or dislocations for the purpose of ascertaining whether the mine so interrupted is or not workable beyond the faults or dislocations AND ALSO that the said lessee shall and will in working the demised mines leave proper and sufficient pillars arches walls and timbers for effectually supporting and keeping open and passable such and so many headings mainways airways waterways and passages as shall be necessary for preserving a proper communication with the unworked minerals during the continuance of the term hereby granted as well as at the end or other sooner determination thereof AND ALSO (if required so to to do by the said lessors or the owners of the surface) shall and will leave such pillars and supports under all the buildings and works now or at any time hereinafter to be erected upon the said surface lands as may be necessary for their protection and safety AND ALSO shall and will maintain or leave at or against all the boundaries to the rise of the demised mines and also at the boundaries between [*points marked on plan*] such barriers as shall be necessary and sufficient (having regard to the power hereinbefore given to communicate with adjoining properties) to separate the same as effectually as possible from any adjoining mines works or premises AND shall not nor will at any time during the term hereby granted wilfully or negligently do permit or suffer any act or thing either within the demised mines and premises or in any other colliery or works which may be connected therewith or otherwise which may occasion or endanger the drowning or surcharging with water gas or foul air of the demised mines or any loss of coal minerals or other substances therein or which may occasion or tend to occasion or bring any creep crush or thrust upon the same or that may tend to hinder stop up or obstruct any of the headings aircourses watercourses travelling roads passages drifts or workings which shall be in or belong to the demised mines AND ALSO shall not nor will make any communication of or from the demised mines and premises or any part thereof with or to any adjoining mines or premises otherwise than is hereby expressly authorised and shall not nor will make any communication from any such adjoining mines and premises to or with any other mines or premises except with [*specified mines if any*] without the express consent in writing of the lessors first had and obtained AND shall not nor will permit or suffer any mine or workings other than those in the demised mines to be worked drained or ventilated into through or by means of the demised mines except as hereinbefore expressly authorised AND shall not nor will work carry on or

Pp. 401 *et seq.*, 425, 448.

Pp. 231, 304, 363.

App. (C.)

use the demised mines and premises or any works hereby authorised or any part thereof or obtain remove or carry away any coals minerals or substances through the demised mines or the pits used in connection therewith or do or suffer to be done any act or thing relating thereto other than and in such manner as is hereby expressly authorised And also shall and will ship or cause and procure to be shipped at the X. docks at A. one half part at least of all the coal obtained from and out of the whole of the mines a moiety of the minerals in which is hereby demised which may be intended for shipment anywhere and also the whole of the coal consigned or obtained from and out of either moiety of the said mines which may be consigned or intended for shipment within a radius of miles from the town-hall at A. subject in both cases to the payment of the rates and charges for the time being payable at such docks and in default of such shipments being made at the X. docks that the said lessee will forthwith pay to the said lessors (as and by way of rent and with the like remedies for recovery by distress and otherwise as if the same were rent reserved by these presents) the amount of all such rates charges and dues as would have been payable to the owners for the time being of the said docks in respect of such coal in case the same had been actually shipped at the said X. docks and which last-mentioned payment (if and when made) shall be accepted by the said lessors in full satisfaction of the covenant lastly hereinbefore contained to ship at the said X. docks.

Pp. 316 *et seq.*

(D.) LICENSES TO MINE.

No. 1.—License to work a Limestone Quarry.

This indenture made the day of 19 Between P. 281.
[*licensor*] of the one part and [*licensee*] of the other part Witnesseth that in consideration of the yearly rent covenants and agreements hereinafter reserved and contained on the part of the said [*licensee*] his executors administrators and assigns to be paid and observed he the said [*licensor*] doth by these presents grant and demise unto the said [*licensee*] his executors administrators and assigns full free irrevocable and Pp. 282 *et seq.*
sole and exclusive license and authority to win and work all those quarries or strata of limestone situate, etc. without any interruption claim or disturbance from or by the said [*licensor*] his heirs or assigns or any other persons whomsoever and to carry away and dispose of the produce thereof to and for his and their own use and benefit and for the purposes aforesaid to make and use any drains or watercourses for clearing the said quarries from any water which may flow or accumulate therein And to erect all such sheds buildings steam and other engines machinery and conveniences upon or near the said quarries as shall be proper and necessary for effectually carrying on the said works or for the workmen employed therein And also to use repair or construct any railways carriage or other ways or roads whatsoever to or from the said quarries Except out of the license hereby granted all such stone as shall be situate under any dwelling-house garden orchard corn-mill or manufactory To have and to hold the said license and authority and all and singular other the premises hereby granted and demised with their appurtenances unto the said [*licensee*] his executors administrators and assigns from the day of the date of these presents for and during the full term of twenty-one years henceforth next ensuing Rendering and P. 286.
paying therefor yearly and every year during the said term unto the said [*licensor*] his heirs and assigns the rent or sum of pounds of lawful money of Great Britain by equal half-yearly payments on the day of and the day of in every year the first payment thereof to be made on the day of now next ensuing free and clear from all taxes rates assessments impositions and deductions whatsoever.

[*Insert the usual covenants for payment of the rent and rates and taxes; also the proper covenants for the working of the quarries, and for the payment of damages; the usual proviso for re-entry, and the lessor's covenants.*]

App. (D.)

No. 2.—License to search for Lead, Zinc, etc., with Option to take Lease (*) [South Wales].

P. 281.

A. B. etc. metal merchants having applied to C. D. and E. F. etc. (hereinafter called "the trustees") for liberty to enter on the lands and premises hereinafter mentioned with a view to search for lead blende zinc or other ores the trustees have consented (subject and without prejudice to the rights of the tenants and occupiers of the same lands) to the said A. B. entering on such portions of the lands and grounds containing acres or thereabouts situate at or near in the parish of in the said county of particularly described in the plan hereto annexed and thereon surrounded by a red line as shall have been first approved of by the mineral agent of the trustees for the purpose of searching for such ores as aforesaid on the following conditions that is to say,—

1. The said A. B. shall not do or commit or cause or permit to be done or committed any waste spoil or damage hurt or injury to any messuage house building erection wall or garden now or hereafter being on the said lands.

Pp. 3, 19, 262. 336, 429.

2. The said A. B. shall save and lay aside in heaps for the use of the said trustees all the soil and earth which may be removed by him in the course of his workings or which would be covered over if not removed and shall fill and level all pits and shafts which he shall make and which shall not be necessarily left open for his workings and shall fence around all pits and shafts and shall make full compensation to the occupiers of the said lands for all injury which they may sustain from the workings of the said A. B. the amount of such compensation to be ascertained and determined by the agent for the time being of the said trustees whose decision shall be final and conclusive.

3.(†) The said A. B. shall pay to the said trustees the sum of £ in respect of this license and also pay to the

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(*) N.B.—This form might be easily adapted throughout to the case of gypsum, etc.

(†) This 3rd clause in the case of a license to search for gypsum, would be altered as follows:—

"The said A. B. shall pay to the trustees the sum of shillings in respect of this license and also pay to the said trustees one th part of the value of the gypsum if sold in its raw state and one th of the value of the gypsum in its manufactured

trustees one th part of the value of the ores (other than iron-ores) which he shall raise out of the said lands which value shall be estimated after the said ores shall have been rendered marketable and before they shall have been removed from the said lands and shall also pay for every ton of 2,240 pounds of iron-ore which shall be raised upon and from the said lands.

4. The said A. B. shall pay all rates taxes and other outgoings (if any) which may be incident to the said workings.

5. In order to try the said lands this consent or license shall continue until the day of 19 and no longer and if before or at the expiration of that time the said A. B. shall desire to continue his working he the said A. B. shall take and the said trustees shall grant a lease of the said ores in the said lands with powers for working the same for the term of years from the day of 19 which lease shall reserve a dead or certain rent of such amount as may hereafter be agreed on between the parties and also royalties at the rates hereinbefore mentioned and such lease shall include reservations of such way-leave and surface rents and clauses covenants and provisions as are inserted in leases for mining purposes of the estates of the trustees.

6. The said A. B. shall execute a counterpart of the said lease and the said lease and counterpart shall be prepared by the solicitors of the trustees at the expense of the said A. B.

7. In case the said A. B. shall not take such lease he shall within one month after the day of 19 or other the time when he shall have ceased to work and explore fill in and level up all pits shafts and workings made by him in the said lands and restore the said lands to and leave them in as good condition in every respect as the same are now in. Pp. 262, 429.

8. Lastly this license is upon this express condition that the said A. B. shall lay out and expend the sum of £ at the least during the ensuing months and if he shall fail to do so or shall in any manner break or neglect to perform any of the conditions and stipulations herein contained

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state if manufactured which he shall raise out of the said lands which value shall be ascertained before the said gypsum shall have been removed from the said lands."

App. (D.)

it shall be lawful for the trustees to determine and put an end to the license hereby given and to eject the said A. B. and all other persons from the said lands.

As WITNESS the hands of the parties this day of 19 .

No. 3.—License to stream for Tin [Cornwall].

Pp. 142 *et seq.*, 281. THIS INDENTURE made the day of 19 BETWEEN A. B. etc. (hereinafter called the lessor) of the one part and C. D. etc. (hereinafter called the lessee) of the other part WITNESSETH that in consideration of the render and royalty hereinafter reserved and of the covenants by the lessee hereinafter contained the lessor doth hereby demise and grant unto the lessee his executors administrators and assigns license and liberty to enter upon the lands belonging to the lessor in the parish of in the county of bounded by the following limits that is to say [*here set out the boundaries*] and there to stream search for and work the beds or deposits of stream tin or the barrows or halvans containing tin to the depth of fathoms but no deeper and to wash dress make merchantable sell and dispose of the tin tin-ore and tin stuff thereby obtained and to do all acts necessary or convenient for the purpose but nevertheless not so as to interfere with the works or plant of any other mine or workings within the limits aforesaid not being exclusively stream tin workings which either now are or at any time during the term hereby granted may be in existence or in the course of operation TO HAVE AND

Pp. 275, 281. TO HOLD the premises hereinbefore expressed to be hereby demised and granted unto the lessee his executors administrators and assigns for the term of years from the day of 19

Pp. 276, 286 *et seq.* RENDERING therefor unto the lessor his heirs and assigns during the said term at the times and in manner hereinafter mentioned one equal part of the monies for which the said tin tin ore and tin stuff obtained by virtue of these presents after the same shall have been dressed and made merchantable shall be sold THE said render and royalty to be made and paid clear of all deductions.

[*Power of distress.*]

Pp. 277, 286 *et seq.* Covenants by the lessee—

1. [*To work the mine effectually.*]
2. [*To dress on the lands the tin, etc., gotten.*]
3. [*To give notice to lessor before removal.*]

4. [*To deliver render in specie, unless required by lessor to sell.*] APP. (D.)
5. [*But if required to sell, to do so before removal.*]
6. [*To give notice of time and place of sale.*]
7. [*And permit lessor to take samples.*]
8. [*And give a return of prices.*]
9. [*And within days after sale to pay royalty.*]
10. [*To pay taxes.*]
11. [*To keep books of account.*]
12. [*To indemnify lessor against damages caused by working.*]
13. [*Not to assign or underlet without license.*]
14. [*And to deliver up the premises at the end of the term.*]

PROVIDED ALWAYS and these presents are upon this express condition that if and whenever any part of the said tin tin-ore and tin stuff so to be rendered as aforesaid or of the said royalty shall be undelivered or in arrear for days whether the same shall have been legally demanded or not or if and whenever there shall be a breach of any of the covenants by the lessee herein contained the lessor his heirs and assigns may re-enter upon any part of the workings under the liberties hereby granted in the name of the whole or may give to the lessee his executors administrators or assigns or leave at his or their last known place of abode in England a notice in writing in that behalf signed by the lessor his heirs or assigns or his or their agent or toller and thereupon in any of the said cases the said term of years shall absolutely determine. Pp. 234, 278, 310.

Covenants by the lessor—

1. [*For quiet enjoyment.*]
2. AND ALSO that the lessor his heirs or assigns will not during the said term himself or themselves search for or work or grant any lease or license to search for or work the beds or deposits of stream tin upon in and under the said lands within the limits aforesaid except in conjunction or connection with a lease or license to work any other mines or minerals.

PROVIDED ALWAYS and it is hereby agreed that if the lessor his heirs or assigns shall be desirous of granting a lease of or license to work the mines and minerals in and under the said lands within the limits aforesaid otherwise than by streaming for tin tin ore and tin stuff and for that purpose of determining the said Pp. 146, 302 *et seq.*

App. (D.)

term at any time before the expiration thereof and of such desire shall give to the lessee his executors administrators or assigns calendar months' notice in writing signed by the lessor his heirs or assigns or his or their agent or toller then and in such case at the expiration of the time named in such notice the term of years hereby granted shall absolutely determine but the lessor his heirs or assigns shall make reasonable compensation to the lessee his executors administrators or assigns for the value at the expiration of such notice of the labour and materials expended by him or them in the workings then being carried on under these presents and for his or their interest in the premises for the then residue of the said term of years the amount of such compensation to be determined by two arbitrators or their umpire pursuant to and so as with regard to the mode and consequences of the reference and in all other respects to conform to the provisions in that behalf contained in the Arbitration Act 1889 or any then subsisting statutory modification thereof or substitute therefor.

In witness, etc.

(E.) WAY-LEAVES, GRANTS AND ASSIGNMENTS OF,—AND EXTENSIONS OF.

No. 1.—Way-leave, grant of

Pp. 366 *et seq.* 370.

This indenture made, etc. Between [*grantor*] of the one part and [*grantee*] of the other part Witnesseth that in consideration of the rent covenants and agreements hereinafter mentioned on the part of the said [*grantee*] his executors administrators and assigns to be paid and performed he the said [*grantor*] doth by these presents grant and demise unto the said [*grantee*] his executors administrators and assigns full free and irrevocable license right and authority for himself and themselves his and their agents workmen and servants to use and employ for the purposes hereinafter mentioned at all times between the hours of five in the morning and eight in the evening all that railway extending in one continued line from A. in the parish of B. to B. in the parish of A. [*describe the way*] Together with full and free liberty for him and them within the hours aforesaid to pass and repass along the said line hereinbefore described and with all usual waggons and other carriages either drawn by horses or drawn or propelled by steam or other engines or by any other power or contrivance to convey all such coal and other minerals as shall from time to time be raised by the said [*grantee*] his executors administrators or assigns from and out of all that mine [*describe the mine, or pit, or seams*] and to convey all other materials articles and things which shall be thought necessary or proper for carrying on the said mine and for the purposes aforesaid to use and employ all the fixed engines rollers ropes machinery buildings and works belonging to the said railway Together with all and singular other privileges advantages and appurtenances to the said right of way belonging or appertaining To have and to hold the said license right and authority and all and singular other the premises hereby demised unto the said [*grantee*] his executors administrators and assigns from, etc. for the full term of twenty-one years thence next ensuing Rendering and paying therefor, etc. [*reddendum and covenant for payment of rent*] And also shall and will at all times during the said term hereby granted permit and suffer the said [*grantor*] his heirs or assigns and all other persons duly authorised by him or them or his late father also to use and enjoy the said railway for any similar purposes peaceably and quietly and with as little disturbance and interruption as possible And shall and will accordingly enter into and adopt all reasonable arrangements which shall from time to time be proposed by the said [*grantor*]

P. 286.

App (E.) his heirs or assigns or other persons aforesaid in that behalf And also shall and will at all times do as little injury as possible to the said railway and the sides rails fences and drains thereof and the buildings works and other property belonging thereto or enjoyed in connection therewith And shall also from time to time during the said term except during the last year thereof contribute his and their just proportion of all such reasonable costs and expenses as shall be required to be incurred for the laying of new rails or the necessary repair support and order of the said railway hereby authorised to be used and employed as aforesaid and of all the sides rails fences drains and walls belonging thereto and of so much of the engines rollers ropes buildings machinery and works held therewith as shall be used and enjoyed by the said [*grantee*] his executors administrators or assigns in common with any other persons whomsoever Provided always and it is hereby agreed and declared that in case and so often as during the said term the said yearly rent or sum hereby reserved or any part thereof shall remain unpaid for the space of twenty-one days next after any of the said days hereby appointed for the payment thereof then it shall be lawful for the said [*grantor*] his heirs or assigns to distrain upon any part of the said railway hereinbefore described for the same rent and all arrears thereof and the property [of the said [*grantee*] his executors administrators or assigns] there found to take and carry away as landlords are authorised to do for rent in arrear until the said yearly rent or so much thereof as shall be due and all costs and expenses occasioned by the non-payment thereof shall be fully satisfied and paid Provided always and it is hereby further agreed and declared that in case at any time during the said term the said [*grantee*] his executors administrators or assigns shall neglect or refuse to perform any of the covenants and agreements hereinbefore contained and on his and their part to be respectively observed then it shall be lawful upon any such breach as aforesaid for the said [*grantor*] his heirs and assigns by notice in writing and signed by him or them and delivered to the said [*grantee*] his executors administrators or assigns or left at his or their usual or last place of abode to declare that these presents and the right and liberty hereby granted shall thenceforth determine and thereupon these presents and the said right and liberty shall forthwith become absolutely void to all intents and purposes whatsoever except in respect of any prior breach of the covenants and agreements herein contained.

Pp. 293, 297.

Pp. 234, 278, 310.

[*Covenants by the grantor for title and for quiet enjoyment.*]

And also shall and will at all times during the said term keep

and preserve the said railway buildings fixed engines machinery rollers ropes and works hereby authorised to be used and enjoyed in common as aforesaid in good order repair and condition and in all respects fit for the purposes of the rights and liberties hereby granted and demised AND ALSO shall and will at all times during the said term pay and discharge all taxes rates and impositions whatsoever to be charged or imposed in respect of the premises hereby demised as aforesaid. IN WITNESS, etc.

No. 2.—Way-leave,—Grant of, for Mineral Purposes only.

THIS INDENTURE made the day of 19 BETWEEN A. B. of (hereinafter designated the said lessor) of the one part and C. D., E. F. and G. H. of (hereinafter designated the said lessees) of the other part WITNESSETH that in consideration of the rents hereinafter reserved and the covenants and agreements on the part of the said lessees hereinafter contained HE the said lessor as far as he lawfully can or may DOTH hereby grant demise and lease unto the said lessees their executors administrators and assigns full and free liberty license and authority to make and construct upon and through the [*estate, defining same*] as near as may be to the place and places shown on the sketch or plan annexed to these presents or at such other place and places on the said estate as may hereafter be mutually agreed upon a regular and continuous iron tramway either with a single or double line for the purpose of conveying ores minerals and mineral substances arising out of or produced from the E. estate (the mines under which are at present leased to the W. Company) whether by underground workings surface workings or open quarries AND ALSO for conveying metals coal timber iron stones or any other materials for all purposes connected with the working of the said mines and works to or from the R. Railway and to unite or join the said railway or tramway with any other railway or tramway and to erect any houses buildings sheds steam or other engines rollers walls fences mounds embankments gates bridges sewers gutters drains watercourses or other conveniences which may be deemed necessary or proper for the formation management and repair of the said tramway AND ALSO full and free liberty to make maintain and use the said tramway when so constructed by them as aforesaid and any modification and alteration of the same which may hereafter be made with the consent in writing of the said lessor AND ALSO full and free liberty for the said lessees and their agents servants and workmen during the continuance of the demise

Pp. 366 *et seq.*, 370.

App. (E.)

hereby created to do all things necessary or convenient as well for making and laying the said tramway as for repairing and upholding the same when occasion shall require And also full and free way-leave and right and liberty of way and passage for the said lessees and all persons having authority from them to use the said tramway and to go pass and repass along the same for all purposes connected with the working of the mines of iron-ore minerals and mineral subtances arising out of or produced from the said E. estate whether by underground workings surface workings or open quarries either on foot or with horses carts waggons trucks and other carts and carriages or by means of an endless chain or by locomotive or other engines And also all other liberties and privileges necessary or convenient for making laying altering repairing using and removing the said tramway or any part thereof Provided always that in the construction of the said tramway the said lessees shall in crossing or passing over or under any of the present occupation or other roads through the said estate make a good and sufficient communication by an under or over bridge in lieu of the accommodation interfered with and in case of an under bridge shall leave a headway sufficient for the passage of a cartload of hay and shall and may make all necessary roads or approaches to such bridges Provided also that the license hereby granted shall apply only to such rights as the said lessor shall himself have to the said occupation roads or other ways and the said lessees shall themselves arrange with any person or persons having rights thereon and indemnify the said lessor from any claim in respect thereof Reserving nevertheless unto the said lessor full power and liberty to lay and make or to grant and demise to any persons whomsoever liberty to lay and make any railway tramway waggon or other way for any purposes under over across and intercepting the tramway so to be made or constructed by the said lessees under or by virtue of these presents or anything herein contained and also to pass and repass over under and at the points of intersection along the said railway or tramway so constructed but so that such last-mentioned ways do not prejudice the tramway to be constructed by virtue of these presents otherwise than by crossing and intersecting the same where necessary and do in crossing occasion as little interruption to the use by the said lessees of the said tramway hereby authorised as reasonably may be And in case it shall be necessary for the purposes aforesaid the said lessees shall divert at the expense of the persons requiring the same the tramway hereby authorised to be constructed as aforesaid And also reserving unto the said lessor his tenants or farmers liberty to pass and repass over

Pp. 41, 253, 275, 360 *et seq.*

across or under the said tramway hereby authorised with horses carts cattle waggons or other things at convenient crossings to be constructed and maintained by the said lessees they impeding the use of the said tramway by the said lessees their executors administrators and assigns as little as possible AND ALSO RESERVING unto the said lessor and his tenants all rights liberties and powers upon over under or in respect of the said tramway which may be necessary for the proper and beneficial working of the mines and minerals under [*other specified portions of the lessor's estate*] either as to surface or as to underground works it being hereby declared that this lease is subordinate to the rights and powers of the said lessor and his tenants to work the last-mentioned mines and minerals TO HAVE AND TO HOLD all the said rights and privileges hereinbefore expressed to be hereby demised with their appurtenances unto the said lessees from the day of 19 for the term of years thence next ensuing but determinable as hereinafter mentioned YIELDING AND PAYING therefor unto the said lessor during the continuance of the demise hereby created in respect of all iron-ore or any other mineral substance matter mineral or thing which may be carried or conveyed by the said lessees over and along the said tramway or which may be gotten or obtained out of the said E. estate after the said day of 19 howsoever the same may be carried or disposed of the way-leave rent or sum of [*one penny*] per imperial ton provided the said tramway shall be made on the west side of the present dwelling-house of the said lessor but in case the said tramway shall be made on the east side of the said dwelling-house of the said lessor then and in such case the said lessees shall pay to the said lessor the way-leave rent or sum of [*one penny half-penny*] per ton imperial in lieu of the rent of [*one penny*] per ton hereinbefore mentioned AND all such way-leave rent shall be paid and payable by two half-yearly payments in each year that is to say on the and in each year the first payment of such rent to be made on the day of which will be in the year 19 PROVIDED ALWAYS and it is hereby agreed and declared by and between the said parties to these presents that if and whenever the said yearly rents hereinbefore reserved or any part thereof shall be in arrear and unpaid for [28] days next after the time when the same shall become due and ought to be paid as aforesaid it shall be lawful for the said lessor to distrain all or any of the engines waggons trucks carts or other carriages found on the said tramway or any part thereof whether situate in the lands and premises hereinbefore described or any other place and to deal with such distress or distresses in such manner as a landlord distraining for rent reserved upon a lease of

Pp. 276, 286 *et seq.*

Pp. 293, 297.

App. (E.)

land is by law authorised to do and by means thereof to recover payment of all arrears of the said rents and all expenses attending such distress or distresses or otherwise occasioned by such non-payment of rent And the said lessees do hereby jointly and severally covenant with the said lessor that they the said lessees shall and will during the continuance of the demise hereby created pay unto the said lessor the several rents hereinbefore reserved and made payable on the days and times and in manner aforesaid clear of all deductions (landlord's property tax only excepted) and also will during the said term (except as aforesaid) pay all existing and future taxes rates assessments and outgoings of every description for the time being payable by either landlord or tenant in respect of the said premises and also for the purpose of correctly ascertaining the amount of iron-ore, or any other mineral mineral-substance matter material or thing which may be carried or conveyed over or along the said tramway or gotten or obtained out of or from the said E. estate, shall and will keep full and true books of account containing such particulars and shall and will permit and suffer the said lessor or any person or persons authorised by him to examine such books and to take copies thereof and extracts therefrom and shall and will on the day of and day of in each year furnish to the said lessor a full and true account of all such iron-ore or any other mineral mineral-substance matter material or thing as may be carried or conveyed along the said tramway or obtained from the said estate during the preceding six months and also shall and will construct the bridges under or over the said occupation or other roads as hereinbefore mentioned and also shall and will fence off and protect the said tramway where necessary and make full satisfaction and reparation to the tenants or farmers of the said estate or other person or persons for all injury or damage to crops or herbage which they may sustain by reason of the construction of the said tramway or which they may sustain in consequence of their horses cattle sheep or pigs getting injured thereon or otherwise and shall and will indemnify the said lessor and his and their estate and effects therefrom and from all claims and demands in respect thereof or from any other claims or demands which may be made by the said tenants or farmers or by persons having or claiming to have rights over the said occupation or other roads or by any other person or persons on account of any injury annoyance inconvenience matter or thing which he or they may allege to be occasioned by reason of the exercise of the powers and privileges hereby granted and from all actions suits accounts claims and demands in respect thereof And will make and keep convenient gates openings and crossings

Pp. 277, 286 *et seq.*

Pp. 434—436.

on the said tramway for the said lessor or his tenants and farmers of the said estate to pass and repass across the same with horses cattle carts and carriages and will make and keep in good repair and condition sufficient drains cuts or ditches to take off and carry away all surface and drainage water which may run from the said tramway and also repair and replace any drains of the said lessor which may have been in any way interfered with by the said tramway And shall and will rebuild and reinstate any buildings on the said estate which may be destroyed or damaged in the construction or user of the said tramway or of any works connected therewith And also shall and will pay to the said lessor compensation at the rate of £ an acre for all land which shall be taken up used or occupied by them in the construction of the said tramway or of any works connected therewith such compensation to be paid immediately on the said land being taken up and occupied and at the expiration of the said demise shall and will take up remove and carry away the rails wood-sleepers earth stone and other materials comprising the said tramway and remove dig fill up throw down and level all embankments cuts ditches and trenches raised and made for the use of the said tramway or made or constructed by reason of or under the liberties hereby granted and generally with all convenient speed return the same to the condition in which it was before the said railway or tramway was commenced and constructed or as near thereto as circumstances will permit And at the expiration of the said term peaceably deliver up to the said lessor the said premises in such state and condition as shall be consistent with the due performance of the several covenants and conditions hereinbefore contained And shall and will during the continuance of this demise use their best endeavours to prevent unauthorised persons trespassing upon the said tramway and put up notice boards showing it to be a private road And the said lessor doth hereby covenant with the said lessees that they the said lessees paying the rents and observing the several covenants and agreements on their part hereinbefore contained may peaceably hold and enjoy the said premises during the term hereby granted without any interruption or disturbance by him the said lessor or any person or persons claiming under him Provided always and these presents are upon the express condition that if and whenever any part of the said rents hereby reserved shall be in arrear and unpaid for the space of 40 days next after the same shall have become due and ought to be paid as aforesaid or if and whenever the said lessees their executors administrators or assigns shall become bankrupt or insolvent or make any assignment to or composition with their creditors or if and whenever

Pp. 42, 286, 315.

Pp. 277, 281, 311, 323.

Pp. 234, 278, 310.

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there shall be a breach of any of the covenants hereinbefore contained and on the part of the lessees their executors administrators and assigns to be paid done and performed or in case the said lessees shall not construct the said railway or tramway for three years from the date of the commencement of this demise the said lessor or other the persons represented by him as aforesaid may give to the said lessees or leave at the said mines at E. a notice in writing declaring that the term hereby granted is determined and thereupon such term shall absolutely determine except as to the remedy of the said lessor or other the persons represented by him as aforesaid against the said lessees their executors administrators or assigns for any breach or non-performance of the covenants and agreements on their part hereinbefore contained PROVIDED ALWAYS and it is hereby agreed between the said parties that if the said lessees shall be desirous of determining this demise at the expiration of the seventh or fourteenth year of the said term they shall be at liberty to do so on giving to the said lessor six calendar months' previous notice in writing of their intention and at the expiration of such notice this grant and demise shall absolutely cease and determine save in respect of any remedies of the said lessor for non-payment of rent or for breach or non-performance of the covenants herein contained AND IT IS HEREBY DECLARED AND AGREED by and between the said parties that if and whenever any dispute and question shall arise between the lessor and the lessees or any of them touching these presents or the construction thereof or the rights duties and liabilities of either party in connection with the premises the matter in difference shall be referred to two arbitrators or their umpire pursuant to and so as with regard to the mode and consequence of the reference and in all other respects to conform to the provisions in that behalf contained in the Arbitration Act 1889 or any then subsisting statutory modification thereof or substitute therefor. IN WITNESS, etc.

Pp. 302, 303.

Pp. 442 *et seq.*

No. 3.—Way-leave,—Extension of, to General Purposes.

Pp. 366, 368, 370 *et seq.*

THIS INDENTURE made the day of 19 BETWEEN the within mentioned lessor of the one part and the within mentioned lessees of the other part WHEREAS in pursuance of the liberty power license and authority given by the within written indenture a single line of iron tramway has been made and constructed and is now being used for the purposes therein mentioned and the lessees being desirous of using for general purposes the said single line of tramway or any double line which

they may construct in pursuance of the power granted to them by the within written indenture have requested the lessor to waive the restriction contained in the within written indenture confining the use of the tramway thereby authorised to purposes connected with the said E. estate and the said lessor has consented to such proposition on the terms and conditions hereinafter mentioned and set forth NOW THIS INDENTURE WITNESSETH that in consideration of the rents hereinafter reserved and the covenants and agreements on the part of the lessees hereinafter contained the lessor DOTH hereby grant and confirm unto the lessees their executors administrators and assigns liberty to make and construct a double line of tramway as mentioned in the within written indenture and to use the said single line already made and constructed and also any double line of tramway which may hereafter be constructed not only for the purposes mentioned in the within written indenture but also for the purpose of conveying all such ores minerals metals coals timber iron stones or mineral substances arising out of or produced from the within mentioned E. estate and such other materials as in the within written indenture are mentioned and also for the purpose of conveying along or to or from any part of the said tramway now constructed and used or any double tramway which may hereafter be constructed and made as mentioned in the within written indenture all mineral substances chattels effects and things whatsoever AND ALSO full and free way-leave and right and liberty of way and passage for the said lessees and all persons having authority from them to use the said tramway now constructed and used or any double tramway which may hereafter be constructed and made as mentioned in the within written indenture and to go pass and repass along the same not only for the purposes in the within written indenture mentioned but for all purposes whatsoever and that either on foot or with horses carts waggons trucks and other carriages or by means of an endless chain or by locomotive or other engine TOGETHER with all such other liberties and privileges in connection with the extended liberties hereby granted as in the within written indenture are expressed concerning the liberties thereby granted RESERVING nevertheless such rights and privileges as in the within written indenture are mentioned TO HOLD the said rights and privileges hereinbefore expressed to be hereby granted unto the said lessees for the remainder now to come of the within mentioned term of [*twenty-one*] years determinable as in the within written indenture is mentioned YIELDING AND PAYING nevertheless such rents and royalties as in the within written lease are mentioned it being the intention of these presents that the within written indenture

Pp. 276, 286 *et seq.*

App. (E.) and the grant and demise thereby made should be read and construed in such and the same manner as if the way-leave rights liberties and easements thereby granted had been granted for the conveyance to and fro of all mineral substances chattels effects and things whatsoever and had not been confined to the conveyance of ores minerals metals coals timber iron stone or mineral substances arising out of or procured from the said E. estate or such other materials as in the within written indenture are mentioned And the said lessees do hereby jointly and severally covenant with the said lessor that they the said lessees shall pay such rents and perform such covenants in respect of the liberties hereinbefore expressed to be hereby granted as in the within written indenture are reserved and contained in respect of the liberties thereby expressed to be granted and in such and the same manner as if the covenants therein contained were herein repeated *mutatis mutandis* And the lessor doth hereby covenant with the lessees that the said lessees paying the rents and observing the several covenants and agreements on their part hereinbefore and in the within written indenture contained may peaceably hold and enjoy the said premises during the term hereby or by the within written indenture granted without any interruption or disturbance by the lessor or any person or persons claiming under him. In witness, etc.

No. 4.—Way-leave,—Assignment of.

Pp. 320 *et seq.* This indenture made the day of 19 Between the within mentioned C. D., E. F. and G. H. of the one part and L. M. gentleman of the other part Whereas by an indenture of lease dated the day of 19 and expressed to be made between the said C. D., E. F. and G. H. of the one part and the said L. M. of the other part the said C. D., E. F. and G. H. demised the mines of iron-ore and ironstone within and under an estate situate at E. and W. in the county of unto the said L. M. and one O. P. their executors administrators and assigns for the term of [*twenty-one*] years from the day of determinable as in the said indenture now in recital is mentioned and subject to the rents covenants and conditions therein contained and on the part of the lessees to be paid observed and performed And whereas by an indenture dated the day of and made between the said O. P. of the one part and the said L. M. of the other part the said O. P. assigned to the said L. M. his executors administrators and assigns for the

then residue of the said term of [*twenty-one*] years ALL the share and interest of him the said O. P. under the hereinbefore recited indenture of lease and of and in the mines of iron-ore and ironstone and hereditaments granted and demised by the same indenture of lease AND WHEREAS the way-leaves rights liberties and easements granted by the within written indentures dated respectively the day of and the day of were granted to the said C. D., E. F. and G. H. their executors administrators and assigns as agents for the lessees or lessee for the time being of the said mines and it has been agreed that such assignment should be made thereof as is hereinafter contained NOW THIS INDENTURE WITNESSETH that for effectuating the said agreement and in consideration of the premises THEY the said C. D., E. F. and G. H. DO and each of them DOTH hereby grant and assign unto the said L. M. his executors administrators and assigns ALL AND SINGULAR the way-leaves rights liberties easements and premises comprised in and expressed to be granted and demised by the within written indentures dated respectively the day of and the day of together with the appurtenances AND ALSO the said indentures TO HAVE AND TO HOLD all the said way-leaves rights liberties easements and premises hereinbefore expressed to be hereby assigned with their appurtenances unto the said L. M. his executors administrators and assigns henceforth for the residue now to come and unexpired of the terms of [*twenty-one*] years expressed to be granted by the said within written indentures subject to the provisoes and reservations and to the payment of the rents and the performance and observance of the covenants and conditions in the said indentures reserved and contained and on the lessees' part to be paid performed and observed AND each of them the said C. D., E. F. and G. H. doth covenant with the said L. M. that they the said C. D., E. F. and G. H. and each of them their and each of their executors and administrators and every person having or lawfully or equitably claiming any estate right title or interest in or to the said premises or any of them will at all times during the said term for which the same premises are hereinbefore expressed to be assigned at the cost of the said L. M. his executors administrators or assigns execute and do every such lawful assurance and thing for the further or more perfectly assuring all or any of the said premises unto the said L. M. his executors administrators and assigns for the then residue of the same term as by him or them shall be reasonably required AND the said L. M. doth hereby for himself his heirs executors administrators and assigns covenant with the said C. D., E. F. and G. H. their executors and administrators that he the said L. M. his executors administrators and

Pp. 280 *et seq.*

Pp. 277, 286 *et seq.*, 326 *et seq.*

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assigns will pay the rents by the said annexed indentures reserved and observe and perform all and every the covenants and conditions in the same indentures contained and on the part of the lessees their executors administrators or assigns to be observed or performed and keep the said C. D., E. F. and G. H. and every of them their and every of their heirs executors admistrators and assigns indemnified against all actions suits proceedings costs damages claims and demands which may be incurred or sustained by reason of the non-payment of the said rents or any part thereof or the breach non-observance or non-performance of the said covenants and conditions or any of them PROVIDED ALWAYS and it is hereby agreed and declared by and between the said parties hereto that in the event of the said lease of the day of hereinbefore recited being determined by notice or any other means prior to the expiration of the term granted by the within written indenture of the day of the said C. D., E. F. and G. H. or the survivor of them or the executors administrators or assigns of such survivor shall be at liberty to determine this assignment either contemporaneously with or within six calendar months after the determination of the said recited lease by giving to the said L. M. his executors administrators or assigns [*twenty-eight*] days' notice in writing of their intention to determine this assignment and upon taking at a valuation the tramway which may have been constructed in pursuance of the powers granted by the within written indenture and the plant and fixed and movable machinery connected and used therewith and such valuation in case of difference shall be referred to two arbitrators or their umpire pursuant to and so as with regard to the mode and consequence of the reference and in all other respects to conform to the provisions in that behalf contained in the Arbitration Act 1889 or any then subsisting statutory modification thereof or substitute therefor AND the said L. M. his executors administrators and assigns shall reassign the said within written indenture and all the powers and privileges thereby granted unto the said C. D., E. F. and G. H. their executors administrators and assigns for all the residue of the term in these presents mentioned which may be then subsisting AND the said L. M. doth hereby covenant with the C. D., E. F. and G. H. that he the said L. M. his executors administrators and assigns will in any of the events aforesaid execute such reassignment as hereinbefore mentioned. IN WITNESS, etc.

No. 5.—Wayleave,—Extension of, to adjoining Mineral Property.

Pp. 366, 368, 370 *et seq.*

THIS INDENTURE made the day of 19 BETWEEN A. and B. of the one part and C. of the other part WHEREAS by an indenture dated, etc. ALL the mines and veins of iron-ore and ironstone lying within or under those [*parcels*] being the lands delineated on the plan attached to these presents and therein coloured and belonging to the said A. and B. were demised unto the said C., etc. for the term of twenty-one years from, etc. determinable, etc. subject, etc. AND WHEREAS the said C. is also possessed for a term of years [*expiring, etc., but in certain events sooner determinable*] of the mines of iron-ore or ironstone within or under certain other lands abutting in part on the first-mentioned lands and in part delineated on the said plan and therein coloured and belonging to one D. AND WHEREAS for the purpose of working the mines under the said first-mentioned lands (hereinafter called the X. mines) the said C. hath sunk a shaft and made divers workings in or under the said first-mentioned lands in one of which workings at a point in the said plan marked E. the said C. has erected a steam-engine for the purpose of drawing and winding the ore out of a certain dip working the position of which is indicated on the said plan by the letter F. AND WHEREAS the said C. hath carried a drift from the said point marked E. nearly up to the common boundary of the said X. mines and the said mines of the said D. at the point marked G. in the said plan AND WHEREAS for the purpose of improving the ventilation and drainage of the said X. mines and in order to give greater security to the miners employed in working the same the said C. hath proposed to carry a drift from the said point G. beyond the boundary of the said first-mentioned lands and through or under the said lands of the said D. in the direction on the said plan marked B. 1, B. 2 to the point B 2 in the existing workings of the said mines of the said D. and having communication with a certain shaft known as Pit No. 4 through or by means of which the same mines or part thereof are now worked and the said C. hath proposed to the said A. and B. as such owners as aforesaid that in consideration of the advantages to arise to the said X. mines from such proposed works as aforesaid he the said C. should be allowed the privilege of drawing and raising through the workings and shaft of the last-mentioned mines all or any iron-ore or waste which may be worked or gotten by him the said C. in the said mines of the said D. at such rents as hereinafter mentioned NOW THIS INDENTURE WITNESSETH that in order to facilitate the carrying into effect of such proposal and in consideration of the rents

App. (E.) hereinafter reserved and of the covenants conditions and agreements hereinafter contained and on the part of the said C. his executors administrators or assigns to be observed or performed THEY the said A. and B. DO HEREBY demise unto the said C. his executors administrators and assigns full and free way-leave and right and liberty of way and passage in through over and along the workings and shaft of the said X. mines and also of the surface roads and ways connected with the same and forming part of or appurtenant to the said first-mentioned lands for the purpose of leading carrying raising to the surface and carrying away and disposing of by the aid of engines horses waggons and other carriages ALL and every the iron-ore and minerals of the said C. his executors administrators and assigns to be raised or gotten from the mines of iron-ore and ironstone now possessed by the said C. within or under the said lands of the said D. and also for the purpose of leading conveying fixing and removing of all and every the mining utensils machinery timbers and other materials matters and things whatsoever which may be requisite or convenient for the working of the said mines of iron-ore and ironstone within or under the said last-mentioned lands and all and singular other liberties privileges authorities conveniences and appurtenances whatsoever needful or necessary in or about the making of the said proposed drift or for the purpose of using
P. 285. the hereby demised premises for the purposes aforesaid To HAVE AND TO HOLD the said way-leave or right of way liberties privileges and authorities and all and singular other the premises hereinbefore expressed to be hereby demised unto the said C. his executors administrators and assigns for the term of years to be computed from the day of thence next ensuing
Pp. 286 *et seq.* YIELDING AND PAYING thenceforth unto the said A. and B. their heirs and assigns the yearly fixed rent of £ in respect of 3,000 tons of twenty-one hundredweight of iron-ore or ironstone to be gotten out of the said mines of the said D. and raised through any shaft or shafts on the said first-mentioned lands whether such quantity of 3,000 tons shall be yearly raised through such shaft or shafts as last aforesaid or not the said rent to be paid by equal half-yearly payments on the day of and the day of in each year AND ALSO YIELDING AND PAYING in the event of the said term being determined in any manner otherwise than on one or other of the two last-mentioned days a proportionate part of the said fixed rent for the current half-year up to the date of the determination of the said term AND ALSO YIELDING AND PAYING unto the said A. and B. their heirs and assigns over and above the said fixed rent of £ the further rent of *s.* *d.* for every ton of twenty-one

hundredweight of iron-ore ironstone minerals or other products of the said mines of the said D. which shall during the said term be raised through any shaft or shafts in the said first-mentioned lands over and above the said yearly quantity of 3,000 tons the said rent of to be paid at the respective times at which the tonnage rent or rents reserved by the firstly hereinbefore recited indenture are payable for all such quantities of iron-ore minerals and other such products as aforesaid (over and above the quantity aforesaid) as shall have been raised through any such shafts as aforesaid in the year next preceding such day of payment PROVIDED ALWAYS and it is hereby agreed and declared that if from any cause the term by the last-mentioned indenture granted in the hereditaments expressed to be thereby demised shall cease or determine before the day of then and in such case and so soon as the same shall happen the term hereinbefore expressed to be hereby granted shall thenceforth cease and determine PROVIDED ALWAYS and it is hereby agreed and declared that if the said C. his executors administrators or assigns shall not in any year raise through any shaft or shafts in the said first-mentioned lands the said quantity of 3,000 tons of iron-ore minerals and other such products as aforesaid of the said mines of the said D. then and whenever any such deficiency shall happen the said C. his executors administrators or assigns may in any following year or years of the said term raise through any such shaft or shafts as last aforesaid such number of tons of ironstone and other products of the same mines (over and above the said yearly number of 3,000 tons) as the respective number of tons raised through such shaft or shafts in the preceding years shall have been so deficient as aforesaid without paying any rent for the same beyond the aforesaid fixed rent of £ PROVIDED NEVERTHELESS that no excess or over-carrying in any preceding year or years of the said term shall come in aid or supply the deficiency or short carryings in any following year or years PROVIDED ALWAYS and it is hereby declared that the said A. and B. their heirs and assigns in addition to the other remedies to which they may be entitled by virtue of these presents shall have or be entitled to such or the like remedies for securing and enforcing payment of the rents hereby reserved when in arrear and shall have such or the like means for ascertaining from time to time and of recording the amount of tonnage upon which such rent shall be payable as if the same had been tonnage rent reserved by the said firstly hereinbefore recited indenture and thereby made payable at the time at which the same is hereby made payable AND that all rights and remedies by the same indenture given to the said A. and B. their heirs and assigns

Pp. 237, 290.

Pp 293, 297.

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in respect of or against any iron-ore ironstone plant utensils materials and effects belonging to him or them which may be found in or upon any part of the premises comprised in the same indenture or in the said first-mentioned lands shall be applicable to all such iron-ore ironstone plant utensils materials and effects as may hereafter be so found whether the same shall have been raised from or belong to or be appropriated or destined for the said X. mines or the said mines of the said D. And the said C. doth hereby convenant with the said A. and B. that he the said C. his executors administrators or assigns will with all convenient speed after the execution of these presents make a communication between the said X. mines and the said Pit No. 4 of the mines of the said D. by means of a drift driven in the direction indicated by the double dotted lines B 1, B 2 in the plan hereunto annexed and will at all times during the term hereby created or during so much thereof as the said C. his executors administrators or assigns shall be tenant or tenants of the said mines of the said D. keep open such communications and do all such other acts as may be necessary or expedient in order to render the said drift and the said Pit No. 4 as efficient as possible for the purpose of draining and ventilating the said X. mines And also that he the said C. his executors administrators or assigns will during the term hereby created pay or cause to be paid unto the said A. and B. their heirs and assigns the said rent hereinbefore reserved at the times and in manner hereinbefore appointed for payment thereof without any deduction And that he the said C. his executors administrators and assigns will not at any time exercise the rights or privileges hereby conferred upon him or them in such a manner as to interfere with or impede the proper and efficient working of the said X. mines or the mode appointed by the said firstly hereinbefore recited indenture for ascertaining and recording the quantities of iron-ore or ironstone which shall be worked or gotten from the same And shall at all reasonable times during the term hereby created or such part thereof as the said C. his executors administrators or assigns shall continue tenant or tenants of the said mines of the said D. permit the said A. and B. their heirs and assigns to enter into and under the lands of the said D. to examine the state and condition of the said Pit No. 4 and the workings connected therewith and to make all such admeasurements and diallings as the said A. and B. their heirs or assigns shall think proper and to take any workmen employed in or about the working of the said X. mines or of the said mines of the said D. to assist in making such measurements and diallings and during the period aforesaid to inspect the books and accounts and plans of the said mines of the

Pp. 231, 304, 363.

Pp. 267, 289, 370, 445.

said D. so far as may be necessary or convenient for ascertaining the amount of iron-ore and ironstone which shall be raised or gotten from the parts of the said last-mentioned mines the workings of which shall be in communication with the workings of the said X. mines and the mode in which the same was disposed of and to take extracts from the same books accounts and plans AND shall with all convenient speed furnish to the said A. and B. their heirs and assigns full and correct plans and admeasurements of all such of the workings of the said mines of the said D. which shall be in communication with the said X. mines so as to show the connection of such workings with the said Pit No. 4 AND shall pay compensation to the said A. and B. their heirs and assigns for any damage that may accrue to the said X. mines or to the said first-mentioned lands or the owners thereof or the roads or ways thereupon by reason of the exercise of the rights or privileges hereby demised PROVIDED ALWAYS and these presents are upon this express condition that if and whenever any part of the rent hereby reserved shall be in arrear for 40 days whether the same shall have been legally demanded or not or if and whenever there shall be a breach of any of the several covenants and agreements by the said lessee his heirs executors administrators or assigns herein contained the said A. and B. their heirs and assigns may give to the said C. his executors administrators or assigns a notice in writing declaring that the said term hereby created is determined and thereupon the same term shall absolutely determine PROVIDED ALWAYS and it is hereby declared that nothing herein contained shall be deemed to prejudice or affect or in any manner to suspend control or interfere with any rights or remedies to which in case this indenture had not been made the said A. and B. their heirs or assigns or other the owners or owner for the time being of the said first-mentioned lands would have been entitled to by reason of the said firstly hereinbefore recited indenture or of the breach or nonperformance of any of the covenants in the same indenture contained and on the part of the lessee to be performed PROVIDED ALWAYS and it is hereby declared that if any dispute shall arise between the parties to these presents or those claiming under them by reason of or relating to any thing herein contained or arising out of the provisions hereof the same shall be referred to arbitration in such and the same manner as if the subject of such dispute had been a matter which the said firstly hereinbefore recited indenture had directed to be referred to arbitration and the decision of the arbitrators or of their umpire in relation thereto shall take effect accordingly. IN WITNESS, etc.

Pp. 234, 278 310.

Pp. 442 *et seq.*

App. (E.)

No. 6.—Way-leave,—Grant of, with right to construct Railway connecting Colliery Works with Branch of principal Railway [South Wales].

Pp. 370 *et seq.* This indenture made between A. B. and C. D. (hereinafter called the lessors) of the one part and E. F. (hereinafter called the lessee) of the other part Witnesseth that in pursuance, etc. and in consideration, etc. they the said lessors do hereby appoint and also grant and demise unto the said lessee All that way-leave or right of bringing or carrying the coal and other minerals and substances and the materials into which the same or any of them may be converted or manufactured as shall be won gotten and worked by the said lessee in and from all the collieries and mines of which they are [*or* are about to become] lessees situate adjoining or under or near to the X. farm situate, etc. to the X. branch of the X. Y. Z. railway and also the way-leave or right of bringing and carrying to or from the said collieries and mines all such plant machinery materials articles and things as may from time to time be required by the said lessee for the purposes aforesaid With full liberty to make construct fix or place use and maintain a railroad with rails and sleepers and other conveniences and a single or double line of rails of the gauge to work properly in connection with the said X. branch of the said X. Y. Z. railway with locomotives or other engines trains trucks and other carriages over and along the surface of the said X. farm from the point marked to the point marked in and upon the plan drawn in the margin of these presents by a road or way not exceeding feet in width but so that the same shall not interrupt or unnecessarily interfere with any existing tramway or road or mode of communication in through or over the said X. farm And also with full liberty and authority for the said lessee his servants and workmen to enter into and upon the lands over which the right intended to be hereby granted is to be exercised for the purposes of this present demise and to make and maintain the railways and works hereby authorised or any other works connected therewith and necessary for making and using the same in a usual and accustomed manner And also with liberty to do all such other acts matters or things as may be found necessary or expedient for the complete and proper use and enjoyment of the said way-leave expressed to be hereby granted and the construction laying down and maintenance of the said railroad according to the true intent of these presents the said lessee in exercise of the liberty power and authority hereby given and granted as aforesaid doing as little damage and injury as is possible consistently with the full exercise and enjoyment of the

right and power hereby granted to the lands over which such right is to be exercised or any buildings in or upon such lands and making compensation as hereinafter mentioned for any damage or injury which may be so done and also in no way interfering with or obstructing the exercise of any mining rights or powers in or under the same lands or any part thereof EXCEPTING AND ALWAYS reserving unto the said lessors and their Pp. 253, 275. tenants workmen and others authorised by them free liberty and authority with engines horses waggons trucks and other carriages to pass and go along the said line and railroad to be used and constructed under the powers hereby granted at such times as they respectively shall think proper for any purpose for their respective own benefit and enjoyment or the purposes of any of the adjoining property or of the said lands over which the power or authority hereby granted is to be exercised but doing as little injury and causing as little obstruction as possible to the property or works of the said lessee under or by virtue of these presents AND ALSO like liberty and authority to cross but not so as to unnecessarily obstruct or interfere with the proper and convenient use and working of it and the other works of the lessee the said line and railroad to be used and constructed as aforesaid by means of railroads or other roads bridges or ways to be constructed by any such persons to whom the present reservation is made on the same level with or under or over the said proposed line and railroad or to effect any junction or junctions with the said railroad at such point or points and at such time or times and as often as they respectively shall think fit AND ALSO like liberty and authority to exercise and enjoy all mining rights and powers to get minerals and substances from or under the same lands but interfering thereby as little as may be with the exercise of the rights and privileges expressed to be hereby granted and making fair compensation for the damage thereby done to the works of the said lessee TO HAVE HOLD, etc. the said liberties, etc. and premises hereby demised unto the said lessee, etc. for the term of years to be computed from the day of YIELDING AND PAYING therefor as and by way of way- Pp. 276, 287. leave rent or royalty the sum of pence for every quantity of 2,520 lbs. of coal or other minerals materials or substances whatsoever (except as next hereinafter mentioned) which shall be carried by virtue of the way-leave hereby granted over upon or along the said railroad hereby authorised to be made or any part thereof or over the said X. farm under the powers hereby granted as aforesaid during the whole continuance of the term hereby granted But it is hereby expressly declared and agreed that so long as the said lessee [*owner for the time being of a certain*

App. (E.) *specified indenture of lease of minerals from same lessors*] shall continue to be the owner of the term thereby created no tonnage way-leave rent or royalty shall be payable under these presents for or in respect of the passage of any coal minerals or materials that shall be worked and got from or under any lands of the said lessors nor for or in respect of the passage of any other coal minerals or materials in respect whereof a way-leave rent is made payable under or by virtue of the said indenture of lease.

[*Reservation of dead or certain rent, payable quarterly, free from deductions (except landlord's property tax).*]

[*Tonnage rent only payable for any half-year, when it would exceed the dead rent for that half-year, and only in respect of such excess.*]

[*Power to lessee to determine lease at end of seven, fourteen, or twenty-one years, or subsequent complete period of seven years, giving twelve months' notice.*]

[*Power for lessors to check lessee's accounts.*]

Pp. 263—265 [*Power to remove tram-plates, etc., at end of term or within three months thereafter, unless lessors purchase same, and lessors may deduct out of purchase-money any arrears of rent, etc.*]

[*Covenants by lessee (as in other forms).*]

[*Power of distress.*]

[*Proviso for re-entry.*]

[*Covenant by lessors (as in other forms).*]

Provided also and it is hereby further agreed and declared that in case any dispute or disputes shall at any time or times during the continuance of the term hereby granted arise between the said lessee on the one hand and any other tenant or tenants of the said lessors on the other hand touching any rights or privileges hereby granted or any other rights or privileges which the said lessee may have or be entitled to in joint use and enjoyment together with any such other tenant or tenants then and in every such case such dispute or disputes shall be submitted to the judgment and arbitration of the mineral agent for the time being of the said lessors and the decision or award of such agent shall be absolutely binding and conclusive on all parties to such dispute.

[*Arbitration clause (as in other forms).*]

No. 7.—Clauses in Mining Lease for Improvement of Railway by Lessee and his subsequent Use thereof, with further Clauses for Lessors' Extension of Same and connection with Principal Railway, and substituted Arrangement in that Event for Lessees' Use of Railway [South Wales].

Provided also and it is hereby further agreed and declared that the said lessee shall and will forthwith or as soon as conveniently may be hereafter convert the present gauge of the railway called the X. Common Old Railway into a gauge of feet inches and also put such railway into thorough repair to the satisfaction of the said lessors and that when and after such conversion and repair shall have been so effected the said lessee shall and will have full power and authority during the continuance of the term hereby granted determinable as hereinafter mentioned to use such railway in connection with the said demised premises for his and their own benefit and also for the benefit of the said lessors and their tenants and others authorised by them in that behalf the said lessee paying therefor no rent or royalty but using the same in a fair and proper manner and with reference to such use thereof as aforesaid and at his own expense keeping such railway in good repair as aforesaid And further that the said lessee shall and will so use or permit and suffer to be used such railway as aforesaid for the carriage of traffic other than his own at the rates following that is to say for any quantity belonging to the same persons or person under tons in any one day pence per ton and for any such quantity amounting to tons and not amounting to tons in any one day pence per ton and for any such quantity amounting to tons or upwards in any one day pence per ton each ton to consist of 2,400 lbs. and such rates to include all shuntings sorting of waggons and putting them into their respective sidings and all other services usually rendered on the like occasions by the X. Y. Z. Railway Company to the colleries in connection with their railway in that district and the traffic hereby provided for to be worked under similar regulations to those of such last-mentioned railway as far as may be and circumstances will permit And in case of any dispute under this present clause the same shall be settled by arbitration as hereinafter provided Provided also that if the said lessors Pp. 520 *et seq.* shall at any time during the term hereby granted extend the said X. Common Old Railway from its terminus to its point of junction with the intended X. branch of the said X. Y. Z. railway and shall improve the said X. Common railway so as to render the same fit for use by the said X. Y. Z. or any other public railway company then and in such case the said lessee

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No. 8.—Lease of Ground for Construction of a Railway,— Mortgagee and Mortgagor being Lessors.

Pp. 273 *et seq.* THIS INDENTURE made, etc. BETWEEN [*mortgagor*] of the first part [*mortgagee*] of the second part and [*lessee*] of the third part WHEREAS by an indenture dated, etc. the pieces or parcels of ground hereinafter described and intended to be hereby demised were (together with several other hereditaments) conveyed and assured to the use of the said [*mortgagee*] his heirs and assigns subject to a proviso for redemption on payment to the said [*mortgagee*] his executors administrators or assigns of the sum of 5000*l.* and interest upon the 12th day of November next ensuing AND WHEREAS the said pieces or parcels of ground are intended to form and be used as a railway for the several purposes hereinafter mentioned and the said [*mortgagor*] and [*mortgagee*] have accordingly agreed to demise the same to the said [*lessee*] in the

manner hereinafter expressed NOW THIS INDENTURE WITNESSETH that in pursuance of the said agreement and in consideration of the rent covenants and agreements on the part of the said [*lessee*] his executors administrators and assigns to be paid and performed HE the said [*mortgagee*] at the request and by the direction of the said [*mortgagor*] testified by his executing these presents DOTH hereby grant and demise and HE the said [*mortgagor*] DOTH hereby grant demise and confirm unto the said [*lessee*] his executors administrators and assigns ALL those pieces or parcels of land as the same are now staked out and extending in one continued line from, etc. to etc. [*describe the parcels*] TOGETHER with their and every of their appurtenances AND ALSO TOGETHER with full and complete license and authority in under upon or along all the said pieces or parcels of land hereby or intended to be hereby demised to lay down and construct upon the most approved plans and principles and upon a proper level a regular and continued iron railway either with a single or double line for the purpose of conveying coal and other minerals or any other materials whatsoever or any passengers or for any other purposes whatsoever for all or any part of such way and to unite the said railway with any other railway or other ways or roads whatsoever and to erect and make any gates houses sheds buildings walls fences bridges mounds drains watercourses works and other conveniences which may be requisite or proper for the effectual formation repair and management of the said railway and for depositing or keeping any coals or other materials which may be intended to pass or which may have already passed along the said way or any part thereof and also to use or employ thereon all such servants workmen horses rollers waggons and other carriages steam or other engines either fixed or locomotive and all other articles means and things which may be required for the purposes of this demise AND ALSO with full and free liberty at all times during the continuance of the said term hereby granted to authorise in writing any other person or persons whomsoever and upon any terms and conditions whatsoever not inconsistent with the terms of this demise to use and employ the said intended railway as fully and effectually as the said [*lessee*] his executors administrators and assigns might use and employ the same by virtue of these presents AND ALL, etc. TO HAVE AND TO HOLD the said pieces or parcels of ground way and all and singular other the premises hereby or intended to be hereby demised unto the said [*lessee*] his executors administrators and assigns from the 1st day of May next for the full term of twenty-one years thence ensuing RENDERING AND PAYING therefor yearly and every year during the said term unto the said

Pp. 274, 360.

Pp. 276. 287.

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[*mortgagee*] his heirs and assigns the yearly rent or sum of 200*l.* of lawful money of Great Britain by equal half-yearly payments on the 1st day of May and the 11th day of November in every year free from all rates taxes assessments and deductions whatsoever the first payment thereof to be made on the 11th day of November now next ensuing And the said [*lessee*] doth hereby covenant promise and agree with and to the said [*mortgagee*] his heirs and assigns in manner following that is to say that he the said [*lessee*] his executors administrators or assigns shall at all times during the said term well and truly pay or cause to be paid unto the said [*mortgagee*] his heirs and assigns the said yearly rent or sum of 200*l.* hereinbefore reserved at the times and in manner aforesaid without any deduction or abatement whatsoever. And also shall and will immediately and with all reasonable diligence in under upon or along the said pieces or parcels of ground hereby demised lay down and construct upon the most approved plan and principles upon a proper level and in a workmanlike manner a regular and continued iron railway according to the true intent and meaning of these presents. And also shall and will during the said term well and effectually drain and keep dry the said railway and works by sufficient drains and watercourses and level down and sow with sufficient grass or clover seed the sides adjoining the said railway along the whole extent thereof in such places as may be capable of producing grass And also shall and will with all convenient speed plant along each side of the said railway and so as to form the outer fence or boundary of such sides a quickset thorn hedge or hedges and in the meantime shall and will effectually fence off the said railway and works from the lands and property adjoining thereto And also shall not nor will at any time during the said term permit any other persons except his or their own workmen or servants to use and employ any part of the said railway and works without leave in writing first obtained from the said [*lessee*] his executors administrators or assigns And also shall and will at all times permit and suffer the said [*mortgagee*] his heirs or assigns, and his and their agents to enter upon any part of the said demised premises at all reasonable times in order to examine the condition thereof And also shall and will at all times during the said term lay down all such new rails as shall be required from time to time and keep and preserve in good order repair and condition the said railway erections houses fixed steam or other engines sheds buildings walls fences gates rails heaps drains watercourses and other works thereto belonging and at the end or sooner determination of the said term hereby granted shall leave the same in such good order repair and condition for the use of the said

Pp. 277, 286 *et seq.*

Pp. 434—436.

Pp. 264, 305, 315, 321, 328.

[*mortgagee*] his heirs or assigns such engines rollers and rails to be taken by the said [*mortgagee*] his heirs or assigns at a fair valuation to be made thereof by competent persons and in case of disagreement by arbitration in the manner hereinafter mentioned PROVIDED ALWAYS that if the said [*mortgagee*] his heirs or assigns shall refuse to take the said engines rollers and rails or to proceed to arbitration as aforesaid or to pay the amount of any such valuation or award it shall be lawful for the said [*lessee*] his executors administrators and assigns within three months from the determination of the said term to remove and take away all such engines rollers and rails for his and their own use and benefit [*Proviso for re-entry as before*]. PROVIDED ALWAYS and it is hereby agreed and declared that it shall be lawful for the said [*mortgagor*] his heirs and assigns from time to time to receive of and from the said [*lessee*] his executors administrators or assigns the said yearly rent or sum hereinbefore reserved or so much thereof as shall for the time being be due and unpaid until the said [*mortgagee*] his heirs executors administrators or assigns shall by notice in writing require the said lessee his executors administrators or assigns thenceforth to pay all such rent to him or them in the manner hereinbefore expressed AND ALSO that until such notice shall be given as aforesaid it shall be lawful for the said [*mortgagor*] his heirs or assigns when and as often as the said rent or any part thereof shall be in arrear and unpaid for the space of twenty-one days after the same shall be so due as aforesaid without demanding payment thereof to enter into and distrain upon the lands ways and premises hereby demised for the said rent or so much thereof as shall for the time being be due and unpaid and the distress and distresses then and there to take detain and dispose of according to law in usual cases of distress for rent in arrear until the said arrears of the said rent and the costs and expenses attending any such distress or distresses shall be fully paid and satisfied [*Covenants for title, etc., and arbitration clause.*] IN WITNESS, etc.

Pp. 293, 297.

(F.) SETTLEMENTS (BY DEED OR WILL),—POWERS IN.

No. 1.—Power for successive Tenants for Life in Possession to work Mines, and to have Use of Plant (maintaining or replacing same); and for same Tenants and General Trustees to demise; and for General Trustees to sell Minerals, with special Provisions regarding Mining Plant (in Deed).

(a.) Power for Tenants for Life to work Mines, using Plant, but keeping up the Value of Plant.

Pp. 17, 21, 230 *et seq.*

Provided always and the intent and meaning of these presents is that any person who shall for the time being be entitled to the possession or the receipt of the rents and profits of the said hereditaments hereinbefore expressed to be hereby appointed and granted respectively as tenant for life shall have full liberty to work all or any of the collieries mines and minerals as well opened as unopened hereinbefore expressed to be hereby appointed and granted respectively and for that purpose to exercise all such privileges as might pursuant to the power to grant mining leases hereinafter contained be conferred on a lessee or lessees of such collieries mines and minerals and that for the purpose aforesaid such tenant for life shall be entitled (subject nevertheless to the discretionary powers hereinafter given to the said C. D. and E. F. or the survivor of them or the executors or administrators of such survivor) to be put into and retain possession of the plant machinery and chattels hereinafter expressed to be hereby assigned to the said C. D. and E. F. their executors administrators and assigns upon trust as hereinafter mentioned or which shall for the time being be subject to the trusts of these presents and to alter and vary any of such plant machinery and chattels or with a view to the ultimate replacement of the same or the substitution of other plant machinery or chattels of equivalent value or efficiency or otherwise in a *bonâ fide* course of management and not for the purpose of deriving a direct pecuniary benefit to remove sell and dispose of any part of such plant machinery and chattels and to receive the produce of such sales for his own use and benefit but so nevertheless that such tenant for life shall be bound so long as he shall continue to work any such collieries mines or minerals to keep the same in efficient working order and to keep up the plant machinery and chattels employed in or about the working thereof and so that any plant machinery and chattels constructed or purchased by such tenant for life and employed for the purpose aforesaid shall be considered as going along with such collieries mines and minerals and

Pp. 263—265.

accordingly that such tenant for life shall be bound at the request of the said C. D. and E. F. or the survivor of them or the executors or administrators of such survivor and at the cost of the trust estate to execute such assignments and do all such acts as may be requisite or proper in order to vest the property of the plant machinery and chattels so constructed or purchased in the said trustees or trustee for the time being upon the like trusts with the plant machinery and chattels hereinafter expressed to be hereby assigned.

(*b.*) *Power for Tenant for Life in Possession, and of general Trustees, to grant Mining Leases.*

PROVIDED ALSO and it is hereby further agreed and declared that it shall be lawful for every person hereby made tenant for life of the said premises hereinbefore expressed to be hereby appointed and granted respectively when he shall be entitled to the possession or the receipt of the rents and profits of the same premises and also for the said C. D. and E. F. and the survivor of them and the executors or administrators of such survivor during the minority of any person who under the limitations hereinbefore contained shall or if of full age would be entitled to the possession or the receipt of the rents and profits of the same premises by deed to appoint by way of lease all or any of the collieries mines or minerals (whether opened or unopened) in under or upon the same premises either with or without any buildings convenient to be held or occupied with the same respectively and either with or without the surface of any lands in or under which the same or any part thereof respectively shall lie and either with or without any lands and hereditaments which it may be convenient that a lessee of such collieries mines or minerals should for purposes connected with such collieries mines or minerals have use or enjoy unto any person or persons for any term of years absolute not exceeding fifty years to take effect in possession or within three calendar months after the date of the appointment and either with or without all or any of the liberties licenses powers authorities easements and privileges respectively hereinafter mentioned (that is to say) full and free liberty license power and authority to search seek for bore dig drive sink for discover win work get and raise the said collieries mines and minerals and for those purposes from time to time to sink drive carry and make pits shafts drifts grooves tunnels soughs levels trenches sluices way-gates gutters water-gates watercourses and other subterraneous or other works in under and upon any part of the said several lands and hereditaments and to erect build and

Pp. 228, 230 *et seq.*

Pp. 274, 360.

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construct such steam-engines furnaces engines mills or gins or other machines and to use occupy maintain and amend the same in such manner as shall be necessary or expedient and to use all other lawful means whatsoever whether of future invention or present use as well for finding discovering winning working getting and raising the said collieries mines and minerals as for draining or discharging or carrying away water foul air stythe or stench from forth and out of the same And full and free liberty of out-stroke and instroke into or from any adjoining or other mines quarries pits shafts or workings either for the purpose of working the collieries mines or minerals under the adjoining lands or for the purpose of working the collieries mines and minerals leased or any of them through the collieries mines quarries pits shafts or workings under any adjoining lands And full and free liberty license power and authority to take and use sufficient ground-room heap-room and pit-room for bringing to bank stacking depositing laying placing converting into coke smelting calcining working and manufacturing the minerals rubbish and refuse which shall from time to time proceed from or be won raised wrought dug or gotten out of the same collieries or mines or from or out of any furnaces manufactories brick-kilns or other works to be comprised in any such lease or to be erected or set up as aforesaid or which may be raised or brought up or imported from any other collieries mines lands or works And full and free liberty license power and authority to have use and take all or any of the water flowing or which shall or may flow or be made to flow in upon under or over any of the said several lands and hereditaments and to turn and convert the same into the said collieries mines or works for working any of the machinery thereof and for any other purpose connected with the working of the said collieries or mines And full and sufficient way-leaves water-leaves roads paths subterraneous and other passages store-yards and other easements and privileges in upon or out of under or over all or any parts of the said several lands and hereditaments to and for the lessee or lessees to be named in such lease his or their executors administrators or assigns and his and their agents workmen and servants from time to time during the continuance of the term to be by such lease granted to take lead carry away and deposit with or without horses carts wains waggons and carriages all or any of the minerals rubbish and refuse to be wrought won or gotten in from forth and out of the said collieries and mines thereby leased And full and free liberty license power and authority to pull down alter vary erect build cut form construct set up lay down use and occupy all such houses hovels sheds lodges buildings erections engines furnaces forges foundries canals watercourses

Pp. 231, 304, 363.

Pp. 230, 274. 304, 366.

Pp. 375 *et seq.*

Pp. 236 *et seq.*, 370.

tramroads railways or framed waggon-ways sideways batteries cuts inclined planes and other roads or ways weighing and other machines conveniences devices inventions and works whatsoever already in use or hereafter to be invented as shall from time to time be necessary expedient or convenient for the standing lying and placing of workmen's workhouses works and utensils for the working and carrying on of the works of the said collieries and mines and for the taking leading or carrying away and depositing of the said minerals rubbish and refuse whether produced from the collieries mines and minerals leased or from other collieries mines or lands and to make construct and set up such gates hedges mounds embankments and other fences as shall or may be proper and sufficient for separating and fencing off any surface railways tramroads or watercourses from the lands adjoining thereto and also from time to time to remove take and carry away all or any of the steam-engines or other engines furnaces forges foundries and other buildings and erections tramroads railways waggon-ways and weighing and other machines at his or their will and pleasure and also to dig and get up stones sods peat clay or spar for making or building such houses or other buildings or works as aforesaid and powers generally to do whatsoever shall be needful or requisite for in or about the winning working obtaining getting washing cleansing and smelting of minerals and for manufacturing and carrying away the same as the person or persons making such lease shall deem it necessary or expedient to give or grant whether such powers shall be of like nature with the liberties licenses powers authorities easements and privileges respectively hereinbefore mentioned or of any different nature So as by every such lease there be reserved and made payable during the continuance of the term thereby granted such yearly certain rent in money acreage rent or money royalties and reservations to be respectively reserved and made payable according to the custom of the county of as can under the circumstances of the case be reasonably had for the premises to be comprised therein but nevertheless with or subject to any such allowance in respect of or deductions from any such rents and reservations as shall be thought reasonable and shall be in accordance with the custom of the same county And so as the same be made without any fine or premium for the making of the same (such covenants conditions provisoes reservations and restrictions as are hereby authorised not being considered in the nature of a fine or premium) and so also that in case any such lease shall be made on the surrender of a former lease the value of the lessee's interest under such surrendered lease may be taken into account in fixing the terms of the new lease And so as in every such lease there be contained a

Pp. 434—436.

Pp. 263—265.

Pp. 288 *et seq.*

Pp. 234, 278, 310.

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Pp. 302, 303. therein And further that in and by any lease to be granted under the present power it may be agreed that the lease shall be determinable by the lessee or lessees his or their executors administrators or assigns at any time or times or in any case or cases to be in such lease specified in that behalf on giving such notice of his or their desire to determine the same as shall be in such lease prescribed and on payment on or before the expiration of such notice of all the rents reservations and other sums of money which shall have become previously and up to that time payable by virtue of such lease yet so nevertheless that in case the lease give to the lessee or lessees his or their executors administrators or assigns such power as aforesaid to determine the same it shall also provide that the determination of the lease by notice as aforesaid shall not prejudice any right of action or other remedy which at the time of the determination of such lease may be subsisting against the lessee or lessees his or their executors administrators or assigns or any of them by reason of any breach then already committed of any of the covenants conditions or agreements on the lessee's part in such lease contained And

FURTHER that it may in any such lease be stipulated that the lessee or lessees shall expend a given sum or shall not be obliged to spend more than a given sum within any time to be in such lease specified in or about working or searching for any collieries mines or minerals to be comprised in such lease AND FURTHER that it may in and by such lease be agreed that all or any questions which may arise touching the construction effect incidents or consequences of the same may be referred to and decided by arbitration in such manner as shall be described by such lease AND it is hereby further agreed and declared that it shall be lawful for the person or persons for the time being entitled to exercise the power to grant mining leases hereinbefore contained from time to time to enter into and accept any new covenants stipulations and other provisions in relation to any collieries mines or minerals leased as aforesaid or any lands and hereditaments liberties licenses powers authorities easements or privileges connected therewith with and from any person for the time being entitled to the benefit of any lease which shall have been made of such collieries mines or minerals by virtue of such power to grant mining leases by way of addition to or explanation or alteration of all or any of the covenants stipulations or provisions in such lease contained yet so nevertheless that such lease shall when so added to explained or altered be conformable to the requirements of the same power and so that the lessee or lessees execute a counterpart of every deed to be executed in pursuance of this provision AND it is hereby agreed and declared that it may be part of the arrangement upon any such mining lease as aforesaid that the lessee or lessees shall purchase any of the plant machinery or chattels hereinafter expressed to be hereby assigned or for the time being subject to the trusts of these presents and convenient to be employed in working the collieries mines or minerals demised or intended to be so by such lease and that the person exercising the aforesaid power to grant mining leases shall have full power to arrange as to the terms of such purchase and the price to be paid and shall be entitled to require that the said C. D. and E. F. or the survivor of them or the executors or administrators of such survivor as such trustees as hereinafter mentioned shall make such assignments and do all such acts as may be necessary for carrying such purchase and arrangement into effect but that the consideration for any such purchase shall be paid to the said C. D. and E. F. or the survivor of them or the executors or administrators of such survivor upon the trusts hereinafter mentioned.

Pp. 442 *et seq.*

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(c.) *Power of Sale of Mines together with, or apart from, the Surface.*

Pp. 242 *et seq.* Provided always and it is hereby agreed and declared that it shall be lawful for the said C. D. and E. F. and the survivor of them and the executors and administrators of such survivor during the life of any person hereby made tenant for life who shall be entitled to the possession or the receipt of the rents and profits of the said premises hereinbefore expressed to be hereby appointed and granted respectively with his consent in writing and also during the minority of any person hereby made tenant for life or tenant in tail by purchase who if of full age would be entitled to the possession or the receipt of the rent and profits of the same premises at the discretion of the said trustees or trustee for the time being to sell all or any of the said premises hereinbefore expressed to be hereby granted and it is hereby agreed and declared that any such sale as aforesaid may be made either by public auction or by private contract and that the said trustees or trustee for the time being may make any stipulations as to title or evidence or commencement of title or otherwise in any conditions of sale or contract for sale of the said premises or any part thereof and may buy in or rescind or vary any contract for sale and re-sell without being responsible for any loss occasioned thereby [*Power to revoke old and declare new uses to effectuate sales,—usual form.*] And it is hereby agreed and declared that any of the said premises may be disposed of by way of sale with any rights of way or other rights or easements upon over or under any other lands or hereditaments or reserving any such rights of way or other rights or easements and may also be disposed of by way of sale with an exception or reservation of all or any mines minerals coals quarries stones clay sand and substances in under or upon the same and with or without rights and powers of or incidental to the searching for working getting carrying away and disposing of the same mines minerals and mineral substances or otherwise in relation thereto as to the said trustees or trustee may seem fit and all or any such mines minerals coals quarries stones clay sand and substances may be disposed of by way of sale with or without such rights or powers as aforesaid separately from or with part only of the surface and in either case without prejudice to any future exercise of the power with respect to the excepted mines minerals or other premises aforesaid or (as the case may be) the undisposed-of surface or other lands And it is further agreed and declared that any purchaser or purchasers or person or persons taking under any such disposition by way of sale may be required to enter into any covenants or

submit to any restrictions of any description which the said trustees or trustee may deem beneficial to the property retained or any part thereof or otherwise expedient and the assurance of the premises sold may be made in such manner and form as may be expedient for effectually creating any such right or easement or for giving effect to every or any such exception reservation or restriction as aforesaid AND it is hereby agreed and declared in manner following that is to say [*Moneys received on sales to be invested in the purchase of other lands to be settled upon the like trusts as hereinbefore declared of the lands hereby settled, with interim powers of investment*].

(*d.*) *Tenant for Life to have Use of Plant.*

AND IT IS HEREBY agreed and declared that the said C. D. and E. F. and the survivor of them and the executors or administrators of such survivor shall be at liberty to permit the person hereby made tenant for life who shall be entitled to the possession or the receipt of the rents and profits of the said premises hereinbefore expressed to be hereby appointed and granted respectively to continue in the complete and undisturbed possession of the plant machinery and chattels hereinbefore expressed to be hereby assigned or of any plant machinery and chattels which under the provisions in that behalf hereinbefore contained shall for the time being be subject to the like trusts and to alter vary remove sell or dispose of such plant machinery and chattels in such manner as is hereinbefore mentioned with respect to the rights and privileges of such tenant for life AND THAT the said trustees or trustee for the time being shall not under any circumstances not constituting a fraudulent collusion with such tenant for life be responsible for the loss or damage (if any) which may be occasioned thereby AND FURTHER that in case upon any lease granted by such tenant for life pursuant to the power to grant mining leases hereinbefore contained it shall pursuant to the provision hereinbefore in that behalf contained be arranged that the lessees or lessee shall purchase any of the said plant machinery and chattels the said C. D. and E. F. or the survivor of them, or the executors or administrators of such survivor shall at the request and by the direction of such tenant for life make such assignments and do such acts as shall be necessary for carrying the purchase and arrangement into effect without being in anywise bound to see to the propriety of or being responsible for the impropriety of such arrangement but so that the consideration to be paid for the plant machinery and chattels so purchased shall be received by the said trustees or trustee for the time being and

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shall be applied and disposed of in the same manner in every respect as if such monies had arisen from a sale of the said plant machinery and chattels made pursuant to the power of sale hereinbefore by reference to the uses of the hereditaments hereinbefore expressed to be hereby appointed and granted respectively contained and declared of and concerning such plant machinery and chattels PROVIDED ALWAYS and it is hereby agreed and declared that it shall be lawful for (but not in any case imperative upon) the said trustees or trustee for the time being if in the exercise of their or his uncontrolled discretion they or he shall consider that the mode in which any tenant for life is dealing with the plant machinery and chattels for the time being subject to the trusts of these presents is contrary to the intent and meaning of the provisions hereinbefore contained with respect to the rights and privileges of such tenant for life to enter into possession of such plant machinery and chattels and to permit the tenant for life to enter into possession of such plant machinery and chattels and to permit the tenant for life to use the same only under such restrictions and in such manner as the said trustees or trustee for the time being shall think fit.

No. 2.—Power to grant Mining Leases [Short Form].

Pp. 228, 230 *et seq.*

PROVIDED ALSO and it is hereby further agreed and declared that it shall be lawful for the said A. B. and after his decease for any person who shall by virtue of the limitations hereinbefore contained be in the actual possession of or entitled to the rents and profits of the hereditaments hereby granted and assured if such person shall be of full age and if not then for the said [*trustees*] and the survivor of them and the executors or administrators of such survivor during any such minority by any deed or deeds to grant demise and lease all and every or any of the mines quarries veins strata and seams of copper lead iron coal stone clay and all other minerals whatsoever unopened as well as opened in under or upon the said hereditaments and premises together with any part of the same hereditaments which may be thought necessary or convenient to be held for buildings roads or ways or other purposes with such mines or quarries unto any person or persons for any term of years not exceeding sixty years to take effect in possession and not in reversion or by way of future interest together with full liberty and authority to search for work win take use and dispose of all such ores and minerals as shall be found therein and to sink and make shafts pits levels drifts trenches airgates waygates and watercourses and to erect

Pp. 362 *et seq.*

and use any smelting refining or other furnaces or mills fire steam or other engines and machinery workmen's and other houses buildings sheds or other conveniences and to use all other lawful ways and means whatsoever not only for finding separating and cleansing any of the said minerals but for converting any of them into a manufactured condition and also to take and use sufficient ground-room heap-room and pit-room for placing or manufacturing any of the said minerals and for laying the waste refuse or rubbish to be from time to time produced from the said mines and quarries and also with full and free liberty to use or to make and use all proper and convenient railways and other ways for the carriage of materials and articles to such mines or quarries and for the carriage and delivery of any of the said minerals with horses carts waggons and other carriages and generally upon such terms and with such stipulations as shall be reasonable usual or necessary for any of the purposes aforesaid so that in every such lease there be reserved and made payable the best and most improved yearly rent or rents dues duties or tolls that can be reasonably obtained for the same without taking any fine premium or foregift for the making thereof and there be contained a power of re-entry for the non-payment of the rent or rents dues duties or tolls thereby reserved and so that the respective lessees duly execute counterparts of such leases and enter into proper and reasonable covenants and agreements for the due payment of such rents dues duties or tolls and for the working and management of the said mines quarries and works.

No. 3.—Power to grant Rights of Way [Short Form].

PROVIDED ALSO and it is hereby further agreed and declared that it shall be lawful for the said A. B. and after his decease for any person who shall by virtue of any of the limitations hereinbefore contained be in the actual possession of or entitled to the rents and profits of any of the hereditaments hereby granted and assured for his or her life and also for the said [*trustees*] and the survivor of them and the executors or administrators of such survivor during the minority of any person who shall by virtue of any of the limitations aforesaid be in the actual possession of or entitled to the rents and profits of any of the same hereditaments for an estate of freehold and inheritance by any deed or deeds to appoint demise or lease any parts of the same hereditaments to be converted into and used as a railway or other way or to be held and enjoyed for the purposes of any such ways unto any person or persons for any term of years not exceeding sixty years

Pp. 230 *et seq.*, 275, 366.

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to take effect in possession and not in reversion or by way of future interest Together with full liberty and authority to make and construct all such railways and other ways upon any approved or improved plan and principles and to use and enjoy the same for any purpose whatsoever and in any manner whatsoever so that in all such leases there be reserved and made payable the best and most improved yearly rents that can be reasonably obtained for the same without taking any premium or foregift for the making thereof and there be contained a power of re-entry for the non-payment of the rents thereby respectively reserved and so that the respective lessees duly execute counterparts of such leases and enter into proper covenants and agreements for the due payment of such rents and be not thereby made dispunishable for waste further than may be required for the purposes aforesaid.

No. 4.—Powers of Selling and of Leasing Minerals (in Will).

(*a.*) *Power of Selling Mines together with, or apart from, Surface.*

Pp. 242 *et seq.*

Provided always and I hereby declare that it shall be lawful for my said trustees or trustee during the minority of any child of mine presumptively entitled to my real estate or any undivided share thereof and also during the lifetime of my said wife if under the trusts aforesaid she shall become entitled during her life to my said real estate to sell any of the real or leasehold estates hereinbefore devised and bequeathed And I hereby declare that any such sale as aforesaid may be made either by public auction or by private contract and that the said trustees or trustee for the time being may make any stipulations as to title or evidence or commencement of title or otherwise in any conditions of sale or contract for sale of the said premises or any part thereof and may buy in or rescind or vary any contract for sale and re-sell without being responsible for any loss occasioned thereby And I hereby declare that for effectuating any such sale it shall be lawful for the said trustees or trustee to execute and do all such assurances and things they or he shall think fit And I hereby declare that any of the said premises may be disposed of by way of sale with any rights of way or other rights or easements upon over or under any other lands or hereditaments or reserving any such rights of way or other rights or easements and that any of the said premises may be disposed of by way of sale with an exception or reservation of all or any mines minerals coals quarries stones clay sand and substances in under and upon the same and with or without rights and powers of or incidental to the searching for

working getting carrying away and disposing of the said mines or minerals coals quarries stones clay sand and substances or otherwise in relation thereto as to the said trustees or trustee of this my will may seem fit and all or any of such mines minerals coals quarries stones clay sand and substances may be disposed of by way of sale with or without such rights or powers as aforesaid separately from or with part only of the surface and in either case without prejudice to any future exercise of the powers with respect to the excepted mines minerals or other premises aforesaid or (as the case may be) the undisposed-of surface or other lands AND I hereby further declare that the assurance of the premises sold may be made in such manner and form as may be expedient for effectually creating any such right or easement or for giving effect to every or any such exception reservation or restriction aforesaid AND I hereby declare that the said trustees or trustee for the time being shall receive all monies which may become payable upon any such sale as aforesaid and shall in their or his discretion and without any responsibility therefor invest and retain the same or any part thereof in or upon any of the stocks funds shares and securities by this my will authorised for the investment of trust funds with power to vary investments or in the purchase of lands or hereditaments in England or Wales for an estate in fee simple or of lands of a leasehold or copyhold or customary tenure convenient to be held therewith or with any hereditaments for the time being subject to the subsisting trusts of this my will or in purchasing the enfranchisement of any lands of copyhold or customary tenure for the time being subject to the subsisting trusts of this my will or shall in such discretion apply the same monies or any part thereof in or towards paying off or discharging any mortgage or other charge or incumbrance for the time being affecting all or any of the hereditaments then subject to the subsisting trusts of this my will AND I hereby declare that the monies which may become payable upon any such sale as aforesaid and the stocks funds shares and securities upon which the same may from time to time be invested shall from the date of such sale be considered for all purposes whatsoever as converted in equity into real estate and the same monies and investments and all hereditaments which may be purchased therewith or with any part thereof shall be held settled and assured to the uses upon the trusts and with and subject to the powers provisoes and declarations by and in this my will limited expressed and declared of and concerning the real estate hereinbefore devised or as near thereto as the deaths of parties and the nature of the property and other circumstances will admit of but not so as to increase or multiply charges or powers of charging.

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(*b.*) *Power to lease Mines, together with incidental Rights.*

Pp. 228 *et seq.* Provided also and I hereby further declare that it shall be lawful for my said trustees or trustee to demise by way of lease all or any of the mines quarries minerals coals stones clay sand or substances in under or upon the real or leasehold estates for the time being subject to the trusts of this my will either with or without any messuage buildings lands or hereditaments convenient to be held with the same respectively and either with or without the surface of the lands in or under which the same or any part thereof respectively shall be and whether the same have or have not been hitherto opened or worked for any term of years not exceeding sixty years to take effect in possession together with all such liberties licenses powers and privileges for searching for working getting washing smelting burning rendering merchantable and disposing of the said mines quarries minerals coals stones clay sand and substances as to the person or persons for the time being exercising the present power Pp. 233 *et seq.* shall seem expedient so as there be reserved on every such demise the best rents tolls duties royalties or reservations by the acre the ton or otherwise to be incident to the immediate reversion that can be reasonably gotten without taking anything in the nature of a fine or premium and so as there be contained in every such demise a condition of re-entry for non-payment or non-delivery within a reasonable time to be therein specified of the rents tolls duties royalties or reservations thereby reserved and so as the lessee or lessees do execute a counterpart thereof and do thereby covenant for the due payment or delivery of the rents tolls duties royalties or reservations thereby reserved Provided always that the reservation of rents tolls duties or royalties the amount of which shall vary with or according to the acreage worked or the minerals coals stones clay sand or substances gotten shall not be taken to be in the nature of a fine or premium though the effect of such reservation may eventually be disadvantageous to the remainderman Provided always that in case under the power of leasing hereinbefore contained any lease shall be made on the surrender of a former lease or agreement for a lease the value of the lessee's interest under such surrendered lease or agreement may be taken into account in fixing the terms of the new lease and no lease made under such allowance shall be considered as made otherwise than at the best rent within the meaning of this my will.

(G.) PARTNERSHIPS IN MINES,—AND MINING COMPANIES.

No. 1.—Deed of Partnership in Mines.

This indenture made the day of 19 Between [*lessees of mines*] of the first part part and [*other partners*] of the second part Whereas by an indenture bearing date the first day of 19 and made between [*lessor*] of the one part and the said [*lessees*] of the other part the said [*lessor*] granted and demised all those mines [*describe the parcels*] To hold the same with their rights and appurtenances unto the said [*lessees*] their executors administrators and assigns as tenants in common for and during the full term of forty-two years subject to the payment and performance of the yearly rents covenants provisoes and agreements therein respectively expressed and contained And whereas the said parties to these presents have agreed to enter into a partnership for the working of the said mines comprised in the said indenture of lease and for selling the produce thereof in the manner and upon the several terms and conditions hereinafter particularly expressed and the said mines and premises were so granted and demised as aforesaid to the said [*lessees*] in trust for themselves and the said parties hereto of the second part in the several and respective shares and proportions hereinafter mentioned and for the purposes of the said intended partnership Now this Indenture witnesseth that in pursuance of the said agreement and in consideration of the premises they the said [*lessees*] do and each of them doth hereby covenant promise and agree with and to the said parties hereto of the second part severally and respectively and according to their respective shares and interest therein that they the said [*lessees*] their executors administrators and assigns shall and will stand possessed of and interested in all and singular the mines and premises comprised in the said recited indenture of lease for the full term thereby granted or for any renewed term thereof subject as aforesaid in trust for themselves and the said parties hereto of the second part their respective executors administrators and assigns in the shares and proportions and in the manner hereinafter expressed And also that they the said [*lessees*] their executors administrators or assigns shall and will at all times during the said term well and truly perform and discharge the several covenants provisoes and agreements in the said indenture of lease on their parts respectively contained And this Indenture also witnesseth that in further pursuance of the said agreement

Pp. 188 *et seq.*

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and in consideration of the premises and of the mutual trust and confidence reposed in each other they the said parties to these presents hereby mutually covenant promise and agree with and to the others and other of them in manner following that is to say,—

(1.) That the parties to these presents shall from the day of the date of these presents become continue and remain co-partners and joint adventurers for the term of twenty-one years determinable and renewable as hereinafter mentioned for the purpose of effectually exploring and working the said mines and veins comprised in the said indenture of lease and for the washing smelting and refining of all ores or minerals which may be produced from such mines or veins and for the sale of all such produce either in a natural or a manufactured condition.

[*If it is desirable to point out in a specific manner the particular objects to which the mining operations should be first directed, or their ultimate design or extent, or any particular mode of operations, or any other arrangements showing the scope and purposes of partnership, insert the necessary provisions in this place.*]

(2.) That the business of the partnership shall be carried on and transacted under the firm of "The Mining Company."

(3.) That the shares and interest of the partners of and in the said mines and premises so demised as aforesaid and of and in the effects and property to be held or connected therewith and of and in all profits or losses which shall be received or sustained in the prosecution of the said mines and works shall be distributed and held in manner following that is to say there shall be considered to be sixty-four shares therein and the said [*one partner*] shall be entitled to eight of such shares or one-eighth of the whole the said [*another*] to four of such shares, or one-sixteenth of the whole [*and so on, according to the facts*].

Pp. 191, 199, 207 *et seq.*

(4.) That the shares and interests of the said partners of and in all such mines works and premises may be sold mortgaged or partially or absolutely disposed of to any co-partner or other persons whomsoever and such persons shall upon any such sale or disposition become partners in the same manner as if they had been parties to these presents and the partners disposing absolutely of their shares and interest shall immediately cease to

be partners and shall be freed from all future claims and liabilities PROVIDED ALSO that in the voluntary sale for valuable consideration of any such shares or interest whether by public auction or private contract all or any one or more of the co-partners shall have the right to take and purchase the same for such price or sum as shall be last bidden or offered for the same PROVIDED ALSO that any such purchaser who shall not be one of the previous co-partners shall be approved of by the said company before any such sale can be affected PROVIDED ALSO that such last-mentioned purchasers and all other persons so entitled to become partners as aforesaid shall enter into and execute all deeds and instruments which may be required by the said company for effectually binding their heirs executors administrators and assigns to the performance of the covenants and agreements herein contained or so many of them as shall then be applicable and shall previously if required by the said company sign and execute these presents and such signature shall be in equity equally binding upon such purchasers and other persons their executors administrators and assigns as if they had been originally parties hereto and all such purchasers and persons who may have been previous partners shall be and remain as effectually subject to the performance of such covenants and agreements in respect of the shares or interest so acquired as aforesaid as in respect of his original or other shares or interest.

(5.) That the capital of the said company shall consist of such sums of money as the partners shall from time to time think necessary for the purposes of the said adventure or works and shall be contributed by them according to their respective shares and interests therein PROVIDED ALWAYS that the whole sum to be expended during the said term for the purposes aforesaid shall not exceed the sum of 10,000*l*.

(6.) That if any partner or any person who is entitled to become a partner as aforesaid shall neglect or refuse at any time to pay and contribute his or her share of such last-mentioned sums or capital it shall be lawful for the other partners either to place the amount of such deficiency to the debit of the account of the partner or other person so failing as aforesaid and to carry legal interest or after six months' notice to any such partner or person to take or absolutely to sell and dispose of all

Pp. 195 *et seq.*

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or any of his or her shares and interest in the said mines and premises in the manner hereinafter provided in case of the expulsion of a partner and the produce thereof to be also applied accordingly and any partner so failing shall immediately upon any absolute sale of his or her whole shares and interests and such application as aforesaid cease to be a partner and shall effectually release the said company from all claims and demands whatsoever.

Pp. 200 *et seq.*

(7.) That the said A. B. shall be the acting partner agent and manager of the said mines and works on behalf of the said company subject to be removed at any time with or without cause by the said company and subject in all respects to their control orders and directions and shall receive as a salary and remuneration for his services such yearly sum as shall from time to time be agreed upon by the said company to be payable every half-year.

(8.) That the said company may from time to time appoint any other partner or person to be such acting agent or manager as aforesaid and in the temporary absence or illness of any such agent or manager any two of the partners may transact his business and perform his duties subject to the terms conditions and stipulations herein in that behalf contained.

(9.) That subject to such control and direction as aforesaid the agent or manager shall appoint and employ all clerks servants stewards under-agents miners and workmen of the said company and fix and pay the salaries and wages of all such last-mentioned persons and receive all the funds and monies of the said company and pay all rents rates and taxes and make all usual and necessary contracts and arrangements for carrying on the said mines and works and transact and manage the whole business of the said company PROVIDED ALWAYS that the said agent or manager shall not give credit to any persons against the express caution or direction of the said company and shall not commence or prosecute any suit or proceeding at law or in equity against any persons whomsoever without their consent or concurrence except in cases of extreme or urgent necessity.

(10.) That the said agent or manager shall not without the consent of the said company release or compound any debt or debts due and owing to the said company except for the full amount thereof first paid nor sign any certi-

ficate of any bankrupt indebted to the said firm except in cases where the debt shall be under the sum of 20*l.* nor buy order or contract for any article matter or thing on account of the said company exceeding the value of 50*l.* except in cases of absolute necessity or in the ordinary course of business and any such article matter or thing so purchased by him without such consent as aforesaid shall be taken and paid for by the said agent or manager on his own separate account.

(11.) That the said agent or manager shall not on any account without the express consent of the company draw make or accept indorse or negotiate any bill of exchange promissory note check or draft or any security in the name or on account of the said company except for the purpose of selling the produce of the said mines and works or of paying for machinery or materials to be used and employed in or upon the said mines or premises or for payment of any salaries or wages due to any persons employed by the said company and any such agent or manager so offending shall be liable to forfeit to the use of the said company double the amount of any sum mentioned or included in any such bills notes drafts or securities aforesaid.

(12.) That proper and intelligible books of account shall be kept by the said agent or manager or under his immediate direction and that true and correct entries shall be made therein of all sums of money received and paid and of all the ore minerals and other produce sold and delivered and of all the materials machinery articles and things purchased on behalf of the said company and the names dates places and any other circumstances which may be useful for both showing and ascertaining the state and proceedings of the said company.

(13.) That the said books of account together with all securities bills notes letters maps plans or sections of the said mines and other writings of the said company shall remain and be kept at the office of the said company and every partner shall at all reasonable times have free access to inspect examine and copy the same.

(14.) That the said agent or manager shall on behalf of the said company well and punctually observe and perform all the covenants provisoes and agreements on their part contained in the hereinbefore-recited indenture of lease or to be contained in any lease of the same premises,

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(15.) That the said agent or manager shall regularly diligently faithfully and honestly discharge the duties and agreements on his part hereinbefore expressed.

(16.) That the said company shall meet once in every quarter of a year upon such days and at such place as shall be mutually agreed upon or at any other time when thereto specially required by any three of the partners.

Pp. 204 *et seq.*, 442.

(17.) That on the same day in the month of April in every year the partners shall meet and as far as possible make a full settlement of all the debts liabilities and engagements of the said company and inspect and examine all the accounts reckonings and transactions of the said agent and company and such agent shall make and deliver at such yearly meeting an estimate and valuation of all the effects and property of the said company (except the mines for the time being unworked) and shall make proper distinctions in such accounts between good and bad debts and the said partners shall upon the approval and settlement of such yearly account sign the same and any duplicates thereof which may be required by any of the partners and such accounts so signed as aforesaid shall be final binding and conclusive to all intents and purposes and shall not afterwards be opened or questioned by any persons whomsoever except in respect of any manifest error to the amount of 20*l.* which may be discovered therein within the space of one year afterwards.

(18.) That if any one or more of the partners shall neglect or refuse to attend such yearly meetings after due notice thereof or to examine and inspect any such account and rest as aforesaid then the other partners present shall proceed to make such account and settlement as aforesaid and any partner refusing to sign such account and settlement shall not be entitled to receive any of the dividends or profits arising from such mines or works until such signature as aforesaid.

(19.) That all differences and disputes arising during the said term shall be decided by a majority of votes and the manner of voting on any such occasion shall be as follows that is to say every sixty-fourth share shall entitle the holder thereof to give one vote and any share less than one sixty-fourth shall not entitle the holder thereof to give any vote at all unless he shall together with the holder or holders of any such last-mentioned

share making together one sixty-fourth share or more agree to give any vote in common PROVIDED ALWAYS that any partner may be competent to vote on behalf of any other partner who may be absent and who may by any writing authorise such present partner to act on his behalf AND PROVIDED ALSO that the partners present by a majority of such votes shall not determine to settle any such difference or dispute by arbitration as hereinafter mentioned.

(20.) That each of the partners shall keep indemnified the other co-partners for the time being and the effects and property of the said company from and against his or her own private debts and engagements and all costs charges damages and expenses on account thereof.

(21.) That any partner lending money on account of the partnership shall be allowed legal interest for the same and such money shall not be repaid without six months' notice in writing from the agent or manager.

(22.) That no partner except the said agent or manager shall on any account whatsoever give accept indorse or negotiate any bills notes drafts or securities or take or dispose of the goods or effects of the said company or engage the credit thereof in any manner whatsoever or interfere in the actual management of the said mines and works except in the manner hereinbefore mentioned. Pp. 200 *et seq.*

(23.) That if any of the partners except as aforesaid shall give accept indorse or negotiate any bills notes drafts or other securities on account of the said company or if the monies effects or property of the said company shall be seized attached or taken in execution on account of any private or separate debts or engagements of any partner or if any partner shall apply to his own separate use any of such monies effects or property then it shall be lawful for the other partners by any writing to determine and put an end to such co-partnership so far as respects any such offending partner and to *expel* him therefrom and the shares and interest of such partner may be taken and purchased by the said company on the footing of the last yearly settlement and if there shall have been no such settlement then at a fair valuation to be determined by arbitration as hereinafter mentioned or such shares and interests may be absolutely disposed of by public auction or private contract to any of the partners or any other persons willing to purchase the same and

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the produce of such sales or valuations shall be first applied in the liquidation and settlement of the account of the partner whose shares or interests are so sold or disposed of as aforesaid with the said company and the surplus if any shall be paid to such partner upon his or her giving a sufficient receipt for the same and a release of all claims and demands in respect of the said partnership and such partner shall upon any such sale or disposition of his or her whole interest in the said mines and premises immediately cease to be a partner for any of the purposes of these presents.

(24.) That all bills notes drafts receipts accounts and securities shall be made and taken in the name of the said company and all bonds conveyances and assurances shall be made and executed in the names of the said [*lessees*] or any other persons to be from time to time appointed by the said company for that purpose and all such lessees their heirs executors or administrators shall at any time when so required by the said company make do and execute all such deeds conveyances assurances matters and things which may be required by the said company or their counsel for effectually divesting themselves of all estate and interest therein and for vesting the same in any other persons.

(25.) That in case the said mines shall after a competent trial thereof prove to be unproductive or shall become exhausted or it may be advisable on any other grounds to discontinue the working thereof then it shall be lawful for the partners at any special meeting to be convened for that purpose to declare the said partnership to be dissolved at any time previous to the expiration of the said term of twenty-one years.

(26.) That in case the said mines shall continue productive or promising it shall be lawful for the partners within six months from the expiration of the said term at any such special meeting as aforesaid to prolong the said partnership for any further period not exceeding twenty-one years to be conducted upon the same terms conditions and agreements as are herein contained and to procure a renewal of the said recited lease for any further period whatsoever.

Pp. 208 *et seq.*

(27.) That at the determination of the said partnership an account in writing shall be forthwith made of all the effects property liabilities and engagements of the said

company and the said partners shall make adequate provision for the sale of all such property and effects and the receipt payment or fulfilment of all such liabilities and engagements for the assignment of all outstanding debts for the benefit of the partners and the settlement and winding-up of the affairs of the said company and the general residue and produce of such settlement shall be paid and divided amongst the partners for the time being in the several shares and proportions to which they may be respectively entitled and upon such division and final settlement the said partners shall enter into and execute all such deeds and instruments in writing as may be required for their mutual release and indemnity.

(28.) [*Arbitration clause (as in other cases).*]

IN WITNESS, etc.

No. 2.—Conveyance of a Share in Mines by a Partner, who is also one of the original Lessees (Trustees).

THIS INDENTURE made the day of 19 BETWEEN [*vendor*] of the one part and [*purchaser*] of the other part WHEREAS by an indenture of lease bearing date, etc. and made, etc. ALL, etc. [*parcels as in the lease*] were granted and demised with the appurtenances unto the said [*lessees*] their executors administrators and assigns as tenants in common for the term of forty years subject nevertheless to the payment and performance of the rents covenants provisoes and agreements therein respectively expressed and contained AND WHEREAS by an indenture of co-partnership bearing date, etc. the said mines veins and premises comprised in the said recited indenture of demise were declared to be held upon the trusts and in the respective shares and proportions therein expressed and particularly as to four sixty-fourth parts or shares or one-sixteenth part or share thereof in trust for him the said [*vendor*] his executors administrators and assigns AND the said several parties thereto thereby mutually covenanted and agreed that they would thenceforth enter into a partnership for the term of twenty-one years for the effectual working and prosecution of the said mines and veins and the sale of the produce thereof and that for the purposes aforesaid they would observe and perform all and singular the provisoes declarations and agreements in the said indenture of co-partnership respectively expressed and declared AND WHEREAS the said [*purchaser*] hath lately agreed with the said [*vendor*] for

Pp. 260 *et seq.*

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the absolute purchase of the said parts or shares of him the said [*vendor*] at or for the price or sum of £500 and it has been further agreed that the said [*vendor*] should enter into the conveyance to the said [*purchaser*] in the manner hereinafter mentioned NOW THIS INDENTURE WITNESSETH that in pursuance of the said agreements and in consideration of the sum of £500 of lawful money of Great Britain in hand well and truly paid by the said [*purchaser*] to the said [*vendor*] on or before the execution of these presents (the receipt of which said sum of £500 and that the same is the full consideration money for the absolute purchase of the said parts or shares hereby assigned the said [*vendor*] doth hereby admit and from the same sum doth hereby absolutely acquit and for ever discharge the said [*purchaser*] his executors administrators and assigns and the said mines and premises) HE the said [*vendor*] as beneficial owner doth by these presents grant assign and transfer unto the said [*purchaser*] his executors administrators and assigns all those or that four sixty-fourth parts or shares or one-sixteenth part or share of him the said [*vendor*] of and in all those mines veins and premises hereinbefore described and comprised in the said recited indenture of lease and of and in all the machinery works property articles chattels rights liberties privileges and appurtenances thereto belonging or enjoyed therewith TO HAVE AND TO HOLD the said parts or shares hereditaments and all and singular other the premises hereby assigned with their rights and appurtenances unto the said [*purchaser*] his executors administrators and assigns for and during all the residue of the said term of forty years so granted of the said mines and premises by the said recited indenture of demise as hereinbefore is mentioned but SUBJECT nevertheless together with the other parts or shares to the payment and performance of the rents covenants provisoes and agreements on the part of the said lessees respectively reserved and contained in and by the same indenture of demise AND ALSO SUBJECT to the observance and performance of the several covenants provisoes declarations and agreements respectively expressed and declared concerning the said parts or shares hereby assigned in and by the said recited indenture of copartnership AND THIS INDENTURE ALSO WITNESSETH that in further pursuance of the said agreements and for the considerations aforesaid HE the said [*vendor*] as trustee doth by these presents grant assign and transfer unto the said [*purchaser*] his executors administrators and assigns (so far as respects his estate and interest therein) all those the said mines veins and premises comprised in and conveyed by the said recited indenture of demise as hereinbefore is mentioned together with

their and every of their rights privileges and appurtenances TO HAVE AND TO HOLD the said hereditaments and premises with their rights and appurtenances unto the said [*purchaser*] his executors administrators and assigns for and during all the residue of the said term of forty years therein but SUBJECT nevertheless to the payment and performance of the rents covenants provisoes and agreements on the part of the said lessees respectively reserved and contained in and by the said indenture of demise and UPON THE TRUSTS and for the several ends intents and purposes respectively expressed and declared thereof by the said recited indenture of co-partnership AND THIS INDENTURE LASTLY WITNESSETH that in further pursuance of the said agreements and in consideration of the premises HE the said [*purchaser*] doth hereby covenant promise and agree with and to the said [*vendor*] that he the said [*purchaser*] his executors administrators and assigns shall and will for and during the remainder of the said term of co-partnership for twenty-one years or any renewed term thereof well and truly observe and perform all and singular the covenants provisoes declarations and agreements on the part of the said [*vendor*] his executors administrators and assigns required by the said recited indenture of co-partnership to be observed and performed as aforesaid or so much or so many of them as shall be still subsisting as fully and effectually as if he the said [*purchaser*] had been a party to and executed the same indenture of co-partnership. [*A covenant of indemnity against debts from a certain date may be added.*] IN WITNESS, etc.

No. 3.—Cost-Book Company's Rules.

1. The company is formed for working [*describe the mines*] in the county of , under the firm of , and shall be managed on the "cost-book" principle. Pp. 192 *et seq.*

2. The capital shall be £ , in shares of £ each, whereof £ per share shall be paid forthwith.

3. The general meetings of the shareholders shall be called by the manager once in every month, at which meetings all the affairs of the company shall be ordered or transacted, and all outstanding accounts and liabities shall, as far as possible, be settled, and all differences shall be decided by a majority of votes—one share to be entitled to one vote, but no shareholder shall be entitled to more than votes; but votes may be given by proxy.

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4. It shall be competent at such meetings to authorise calls and expenditure, to declare dividends, and to dissolve the company.

5. The capital of the company shall not be increased, and no new mine or adventure shall be entered upon, without the consent of the whole of the shareholders.

6. The shares shall be transferable at the will of the holders, and such transfer shall be effected by entry in the cost-book, either by the signatures of the vendor and purchaser therein, or by the manager for the time being, duly authorised by a certificate in the form hereto annexed, or to the like effect.

Pp. 261, 262.

7. No such transfer shall be made without the full payment by the seller of all sums due in respect of the share or shares so sold at the last general meeting; and the purchaser shall be liable to all claims and demands, and be entitled to all profits arising in respect of his share or shares from the time of such last general meeting.

8. The manager shall at every general meeting produce a correct list of the existing shareholders, with the number of shares held by each person; and such list shall be approved of at every such meeting, and shall always be properly inscribed in the cost-book.

Pp. 194, 195.

9. If any shareholder shall refuse or neglect for three calendar months to pay the call or calls due on his share or shares, such share or shares may, at any subsequent general meeting, be declared to to be forfeited for the benefit of all the other shareholders, according to their respective interests therein; and such forfeiture shall comprise all share or shares in the materials and property of the company.

Pp. 194, 195.

10. Any shareholder shall at any general meeting be at liberty to relinquish his share or shares on giving notice in writing to the manager for that purpose, and on settlement of all claims arising with respect to such share or shares, and on giving up all his interest in all the materials and property of the company.

Form of Certificate.

To the Manager of the Mining Company.

I, the undersigned [*seller*], hereby certify that I have this day sold to the undersigned [*purchaser*] share of and in the mines held by the said company, and of and in all and singular the machinery, ores, minerals, materials, monies, debts and other effects and property now belonging to the said company, and the dividends and profits to arise therefrom. AND I hereby authorise you to transfer such share accordingly. AND I the said [*purchaser*], hereby accept such share, *subject* to the rules of the said company.

DATED this day of 19 .

WITNESS, A. B.
C. D.

No. 4.—Mining Company's Memorandum and Articles of Association.

(A.) WHERE THE COMPANY IS LIMITED BY SHARES.

I.—*Memorandum of Association.*

1. The name of the company is "The X. Y. Z. Mining Co., Limited."
2. The registered office of the company shall be situate in England.
3. The objects for which the company is established are—

   [*The acquisition (under specified contract if any) of specified mineral estate, and the development of same, and the acquisition and development (from time to time) of other adjacent mineral estates.*] And doing all such other things as are incidental or conducive to the attainment of the objects above mentioned.
4. The liability of the members is limited.
5. The capital of the company is £ divided into shares of £ each.

WE, the several persons whose names and addresses are subscribed, are desirous of being formed into a company, in

App. (G.)

pursuance of this Memorandum of Association, and we respectively agree to take the number of shares in the capital of the company set opposite our respective names.

—	Names, Addresses, and Descriptions of Subscribers.	Number of Shares taken by each Subscriber.
1.	A. B. of , in the county of , Esquire ...	10
2.	,, ,, ,, ,, ...	,,
3.	,, ,, ,, ,, ...	,,
4.	,, ,, ,, ,, ...	,,
5.	,, ,, ,, ,, ...	,,
6.	,, ,, ,, ,, ...	,,
7.	,, ,, ,, ,, ...	,,
	Total shares taken	,,

Dated the day of 19 .

Witness to the above signatures,
M. N. of , etc.

II.—*Articles of Association* (to accompany preceding Memorandum of Association).

[N.B.—*These articles may simply consist of the "Regulations for Management of a Company limited by Shares" that are contained in Table A. scheduled to the Companies Act*, 1862, *which regulations are, by ss.* 14 *and* 15 *of that Act, to be deemed, so far as applicable, to be the regulations of every company limited by shares and formed under the Act, unless the same are excluded, or excepting so far as the same are modified by express articles of association. Where these regulations are not adopted* simpliciter, *but (as is usually the case) express articles of association are drawn up, these articles are commonly framed upon the Regulations in Table A., which are readily adaptable to any (mining) company.*]

(B.) Where the Company is limited by Guarantee, and has no Share Capital.

I.—*Memorandum of Association.*

1. [*The same as in form A. above.*]
2. [*The same as in form A. above.*]
3. [*The same as in form A. above.*]

4. Every member of the company undertakes to contribute to the assets of the company in the event of the same being wound up during the time that he is a member, or within one year afterwards, for payment of the debts and liabilities of the company contracted before the time at which he ceases to be a member, and the costs, charges and expenses of winding-up the same, and for the adjustment of the rights of contributories amongst themselves, such amount as may be required not exceeding £ .

WE, the several persons whose names and addresses are subscribed, are desirous of being formed into a company, in pursuance of this Memoradum of Association.

[*Here follow names, etc., as in form A., leaving out numbers of shares.*]

II.—*Articles of Association* (to accompany last preceding Memorandum of Association).

[N.B.—*These Articles may be in the form exemplified in Schedule II., Form B., to the Companies Act*, 1862.]

(C.) WHERE THE COMPANY IS LIMITED BY GUARANTEE, BUT HAS A SHARE CAPITAL.

I.—*Memorandum of Association.*

1. [*The same as in form A. above.*]
2. [*The same as in form A. above.*]
3. [*The same as in form A. above.*]
4. Every member of the company undertakes to contribute to the assets of the company in the event of the same being wound up during the time that he is a member, or within one year afterwards, for payment of the debts and liabilities of the company contracted before the time at which he ceases to be a member, and the costs, charges and expenses of winding-up the same, and for the adjustment of the rights of the contributories amongst themselves, such amount as may be required not exceeding £ .

WE, the several, etc. [*exactly as in the second form of Memorandum above given*].

App. (G.)

II.—*Articles of Association* (to accompany last preceding Memorandum of Association).

1. The capital of the company shall consist of £ , divided into shares of £ each.
2. The directors may, with the sanction of the company in general meeting, reduce the amount of shares.
3. The directors may, with the like sanction, cancel any shares belonging to the company.
4. All the articles of Table A. shall be deemed to be incorporated with these articles, and to apply to the company.

We, the several, etc., respectively agree to take the number of shares [*exactly as in the first form of Memorandum above given*].

(D.) When the Company is Unlimited, but has at the same time a Capital divided into Shares.

I.—*Memorandum of Association.*

1. [*The same as in form A. above.*]
2. [*The same as in form A. above.*]
3. [*The same as in form A. above.*]

We, the several, etc. [*exactly as in the second form of Memorandum above given*].

II.—*Articles of Association* (to accompany last preceding Memorandum of Association).

Capital of the Company.—The capital of the company is £ , divided into shares of £ each.

Application of Table A.—All the articles of Table A. shall be deemed to be incorporated with these articles, and to apply to the company.

We, the several, etc., respectively agree to take the number of shares [*exactly as in the first form of Memorandum above given*].

GLOSSARY OF ENGLISH MINING TERMS.(*)

A.

Adit—A level—a horizontal drift or passage into a mine, by which it is entered and unwatered.

Adlings or *Adelings*—Earnings.

Adventurers—Shareholders.

After-damp—See *Choke-damp.*

Air-head—A channel driven on a level with the top of a gate-road, in the ten yard coal, and parallel to it.

Air-pipes or *Boxes*—Tubes or pipes for ventilation.

Aitch-piece—That part of the pipes of a forcing pump in which the valves are placed.

Arch—Ground unworked near a shaft.

Arles—Earnest money, in binding men.

Arrage—A sharp point or corner.

Attle—Refuse.

Average produce—The quantity of pure or fine copper in 100 parts of ore, in Cornwall.

Average standard—The price per ton of pure or fine copper in the ore.

Average weight—The mean weight of a tub of coals for a certain period, on which wages are calculated.

B.

Baby—A balance weight near the end of a pit rope.

Back—As to lode or vein, the part nearest the surface; also a branch from a main vein like the segment of a circle; as to an adit, the part of the vein above it; also, the natural transverse cleavage of rock; also, the diagonal parting in coal.

Back-end—The remaining half of working coal after the first blast.

(*) The author, in compiling this Glossary, appears to have been much indebted, for the Cornwall words, to a Glossary published by the proprietor of the *Mining Journal*; and for many of the words in use in the northern coal trade, to the Glossary of Mr. Greenwell.

Backing-deals—Wood behind cribs for supporting the earth.
Back-shift—The second set of coal hewers in each day.
Back-skin—A leather covering for miners in wet places.
Baff-end—A bit of wood for driving behind cribs or tubbing.
Baff-week—The alternate week after the pay-week.
Bait—A pitman's provisions.
Bal—A mine.
Balk—A kind of *hitch*, producing a *nip*; also, strong timber, which, when set in the direction of a drift at its side, to support the cross balks, is called a *running* balk.
Baln stone—Roof-stone.
Band—Stone interstratified with coal.
Bandsman—The loader of the coal.
Bank—The surface at the pit's mouth.
Banksman—The man who brings the waggon to the surface.
Bar of ground—An intersecting vein of different mineral substances.
Bargains—The periodical and other contracts with miners.
Bar-grip—Applied to a vein closing.
Barrier—A thick wall of coal left between two mines.
Barrow-man—See *Putter*.
Basker—Old cloth used in boring wet holes.
Basset—The appearance of strata to the day; also, the upper end of mining works.
Batch of ores—The ore sent up by any pair of workmen.
Batework—Short work.
Bating—Lowering a drift or road.
Battery—An embankment.
Beans—A kind of small coals.
Bearers—Supports to engine pumps in the shaft.
Beater—A tool for charging a blast.
Beche—(pron *bitch*)—A boring tool.
Bed—A horizontal seam or deposit of mineral; also, the foundation of wall or other work.
Belland—Dusty lead ore; also, a disease incurred by cattle in lead districts.
Bellies—Deposits of ore.
Benching up—Working on the top of coal.
Bend—Hard clay, or other hard substance.
Bend away—A signal for raising up.
Bender—A bit of iron attached to cylinders for a pit rope, or the trunks.
Benk—The face of the coal in work.
Biards—See *Bearers*.
Bildas—The extra work of pitman for the butty.
Bina—Hard clayey substance.

Bind—Sandstone, or hard shale.
Bing—Eight hundredweight.
Bing-hole—A hole through which ore is thrown.
Bing-place or *Bing-stead* — Where the ore is laid ready for smelting.
Bit—The steel end of a boring implement.
Black jack—Blende, or sulphuret of zinc.
Black tin—Tin ore fit for smelting.
Blanch—Lead ore mixed with other minerals.
Blast—The air supplied to a furnace ; also, a shot.
Blast-holes—The holes of a windbore, or pump bottom.
Blasting—Breaking rocks or coal by gunpowder.
Blind coal—Anthracite.
Block tin—Metallic tin.
Blower—A smelter ; also, a great discharge of gas from a fissure.
Blowing—Blasting.
Blue John—Fluor spar.
Board or *Board gate*—Applied to a level transverse to the grain or face of coal.
Board room—The width across an old board.
Bob—The engine beam.
Boles or *Bayle hills*—Ancient smelting places.
Boll —A measure of 9676·8 cubic inches, or 34·899 imperial gallons.
Bolt hole—A passage from a gate road into a side of work.
Borer—An instrument for boring or perforating mineral ground.
Boulder—A fragment of rock brought by natural means from a distance.
Bounds—A tract of tin-ore ground.
Bout—A mode of measuring lead-ore in Derbyshire ; twenty-four dishes.
Bovey coal—Lignite or charred wood.
Bow—A bit of iron in a waggon for letting it down a pit.
Bowke—A small wooden box for drawing clay and ironstone, and for sinking.
Bowse—Lead ore as cut from the vein.
Brace—The platform over the mouth of a shaft.
Bracehead—A piece of timber for connecting boring rods.
Brake—A lever used in boring ; also, a band of iron pressed on a wheel to check or stop it.
Brakesman—The man charged with the winding engine.
Brake-sieve—A sieve used in washing ore.
Branch—A small separating vein.
Brasses—Sulphate of iron in coal.
Brat—A thin bed of coal mixed with pyrites or carbonate of lime.
Brattice—A wooden partition for ventilation.

Brazil—Iron pyrites.
Breakes—Fissures in old coal workings.
Breakings—The poor part of ore ready for being crushed.
Breast—The face of coal workings.
Brenner—A smelter.
Brettis—Timber or boards packed and filled with rubbish.
Broadgate—A main working.
Broken—A part of a coal mine where the pillars are being removed.
Brood—Impure matter mixed with ore.
Browse—Ore imperfectly smelted, mixed with cinder and clay.
Bryle—The traces of a vein, in loose matter, on or near the surface.
Bucker—An ore bruiser; also, the instrument used by him.
Bucket—The piston of a lifting pump.
Bucket-lift—The iron pipes of a lifting pump.
Bucket-rods—Wooden rods to which a piston is attached.
Bucking-iron—A pulverising tool.
Bucking-plate—The iron plate for the ore to be bruised.
Bucklers—Small chains put round coals.
Buck-up—Contribution by shareholders.
Buddle—A frame of wood used in buddling.
Buddling—Separating or washing ores.
Bule—A bit of iron put round pistons.
Bull—A round tapering iron bar used in keeping water from blast holes.
Bunch of ore—A small deposit.
Bunding or *Bunning*—A platform for holding or delivering minerals.
Bunton or *Bunting*—A strong piece of timber.
Burden—Matter on a bed of stream tin-ores.
Burning house—Furnace for calcining tin-ores.
Burr—Solid rock.
Burrow—A heap of refuse.
Butty—A collier contracting by weight or measure.

C.

Cage—A shaft carriage; also, the barrel for a whim rope.
Cakes of ore—Flat masses.
Cal—Wolfram, or tungstate of iron.
Calcining—Roasting iron-ore.
Calling course—The time for the men to go to work.
Canch—A part of a bed of stone worked by quarrying.
Cand—Fluor spar.

Cap—A flat piece of wood between the punch top and the roof of a mine.
Cap-head—A top for an air-box used in sinking.
Capel—A composite stone of quartz, schorl, and hornblende.
Captain—A manager of a mine.
Captain dresser—A manager of ore-dressing.
Carrack—See *Capel*.
Case—Applied to the broken state of a vein.
Cases of spar—Intersecting veins of quartz.
Cash—A soft band.
Casing—A division of planks.
Cast-hole—The first diggings in a shaft.
Cat-dirt—A substance of clay, coal and iron pyrites, or soft toad-stone.
Cathead—A small capstan; also, a nodule of iron ore.
Caunter lode—A vein inclining with other veins.
Caving—The gleaning of ore from old heaps.
Cawk—Sulphate of barytes.
Chacing—Following a vein by its range.
Chair—Used in drawing up materials.
Chaldron—53 cwt. or 22·526 bolls; by statute, 36 bushels, or 28·266 cwt.
Charger—A tool for charging blasting holes.
Charter-master—See *Butty*.
Chats—Small pieces of stone with ore.
Check—Applied to a vein closing.
Cheek—The side or wall of a vein.
Chert—Nodular flint stones.
Chill—Vibration of rock on being struck.
Chimming—A process like tossing for smaller quantities of ore.
Chipper—Ore dresser.
Chock—A bit of wood for stopping engines.
Chock and Block—Tightly filled up.
Choke-damp — Foul air, carbonic acid gas, produced after explosions.
Chun—An open chasm in a vein.
Churn-drill—A large long drill, chisel-pointed.
Clack—A pump valve.
Claggy—Adhesive.
Clam—A bracket or support for a pump.
Clauncher or *Clanger*—A tool for cleaning blast holes.
Cleading—Deals nailed to timber.
Clearer—A collier who holes under the coal.
Cleat—A vertical joint in coal or stone.
Cleet—A wedge.
Clippers—A hook used in sinking.

Cliviss or *Clives*—A bit of turned iron, with a spring, for fastening a kibble to a rope.

Clunch—A hard argillaceous stratum.

Cob—To break ore with hammers, separating the worthless parts.

Cockle—Schorl, a mineral.

Cod—The bearing of an axle.

Coestead or *Coe*—A small building.

Cofering—Securing a shaft from water by clay.

Coffin—Old workings open to the day.

Cog—A small square building of stone or coal for supporting the roof in holeing.

Collar or *Collaring*—Timber securing the pumps or upper parts of a shaft.

Collar-launder—The pipe at the top of a lift of pumps for carrying water to a cistern.

Connecting-rods—The large rods of an engine beam.

Consideration—Money paid to miners for bad coal, or for extra work.

Coper—The person agreeing to pay cope.

Corder—The man who makes and repairs corves.

Core or *Coor*—A period of 6 or 8 hours' work by miners—4 or 3 to the day of 24 hours.

Corf—A square wicker frame for loading coals; also, a sledge for carrying ore to the shaft bottom.

Corf-bow—The handle of a corf.

Costeaning—Discovering veins by sinking shafts, and driving transversely.

Country—The ground transversed by a vein.

Coup—To overrun; also, to exchange.

Course of ore—The part of a vein containing the ore.

Coursing—Conducting the air in different directions by means of doors and stoppings.

Cover—The box for removing ore from the vein; also, the place at the head of a trunk.

Cow—A fork of wood or iron behind the last waggon for preventing sliding back.

Crab—A capstan for raising weights in a shaft.

Cradle—A scaffold suspended in a shaft.

Cramp—A pillar of rock or mineral left for support.

Crampet—A bracket.

Cranch—Part of a vein left by old workers.

Crease—A division of buddled work.

Creep—A rising of the floor of a mine, occasioned by the weight of incumbent strata, in pillar working.

Crib—A circular wooden frame, used in pulverizing ore in a shaft; also, for bricking a shaft.

Crop—The best ore ; also, the basset or outburst of strata at the surface ; also, to leave coal at the bottom of a bed.
Cross-course—A intersecting vein.
Cross-course-spar—Radiated quartz.
Cross-cut—A level driven directly across the course of a vein ; also at an angle with the grain of coal.
Crosses and holes—A mode of marking the ground before setting stowces.
Crow coal—Inferior coal ; also, the uppermost bed of coal.
Crown tree—A plank for supporting the roof of coal.
Crush—The falling in of coal pillars.
Crushing—Grinding ores with water
Cupelo or *Cupola*—A small furnace.
Curb—See *Crib*.
Cut—To intersect a vein.
Cutters—Intersecting joints in rocks.
Cutting—An air course at either end of the work, after the coal is worked out ; also, working coal by vertical hewing.
Cuttings—Refuse of the bowse.

D.

Dacker—Applied to want of air.
Dam—Choke damp, or foul air.
Damp sheet—A large course sheet for diverting air.
Dan—A square frame of wood for drawing coals.
Dant—Soft inferior coal.
Darg—A quantity of coal to be worked at a fixed price.
Dashing—Applied to raisng air to prevent explosions.
Davy lamp—The safety lamp invented by Sir H. Davy.
Dawlings—Rich veins becoming poor.
Day—The surface.
Day-hole—A level from the surface.
Day-water—Water from the surface.
Dead—Unventilated ; also, as to a vein or ground, unproductive.
Deads (pron. *Deeds*)—Refuse.
Deaf ore—Light whitish substance, with grains of ore.
Dean—The end of an adit.
Deep level—The deepest level communicating with the engine shaft.
Deputies—Men employed to secure mines from accidents.
Dialling—Surveying.
Dileuing—Washing ores on a hair-bottomed sieve.
Dip—The line of declination of strata.
Dippa—A small pit.
Doit—Foulness, or damp air.

Dissueing—Breaking down the sides or walls of a small vein, so as to take it afterwards without waste.

Divining rod or *Dowsing rod*—A hazel rod used for discovering veins.

Doggy—An underground superintendent; also, the deputy of a butty collier.

Dog-hook—A long hook for drawing an empty waggon.

Dogs—Bits of wood at the bottom of an air-door; also, the part of the chain fastened to a rope.

Doorstead—Upright timber in the sides of levels for supports.

Dotts or *Dott-holes*—Small openings in the veins.

Douk or *Donk*—A soft clayey substance.

Dowell—An iron bolt.

Down-cast—Applied to a pit down which the air passes; also, to a dyke, where the coal is underneath.

Dradgy ore or *Drady trade*—Coarse matter, with little ore.

Draught—The quantity of coals brought to bank at a certain time.

Dredge sump—A reservoir of water for the purification of air passed through it.

Dressers—Ore cleaners.

Drift—A horizontal passage underground.

Drill—A implement for boring holes.

Drink-time—Meal-time.

Driver—A bit of iron for forcing the wood into a blasting hole.

Driving—Digging horizontally.

Drop—The quantity of coal fallen at one cutting; also, the apparatus for shipping coals in the waggons.

Dropper—A branch leaving the main vein.

Druggon—A square box for lowering water to the mine.

Drum—The cylinder for winding the rope.

Druse—Hard concreted stony crust on the sides of caverns.

Duff—Small coals after separation of the nuts.

Durns—A framework of wood for keeping the ground open in shafts and adits.

Dyke—A vein of extraneous rock.

Dzhu—To dig away part of the end of the rock to be blasted, for a better blast.

E.

Elvan—Mineral.

Elve—The handle of a pick.

End—The head of an adit, applied to an adit driven in a line with the grain of the coal.

Ending—An adit driven in a direction with the grain of the coal.
End-joints—See *Cutters*.
Erles—Earnest money.
Eye—A top of a shaft.

F.

Face—Applied to coal at right angles with the grain; in iron mines, the work in progress; also, the end of workings.
Famp—Soft tough thin shale beds.
Fang—A niche cut in the side of an adit or shaft for an air-course.
Fanging—A main of wooden pipes.
Fast—The firm rock below the soil or covering.
Fast-end—The part of the coal bed next the rock.
Fault—A dislocation of the strata.
Fausted ore—Refuse lead-ore, for finer dressing.
Feeder—A small vein joining a larger vein—also, a spring or stream.
Feigh—Refuse.
Fighting—Applied to reversed ventilation.
Fillating—Wood stringing.
Fire-damp—Light carburetted hydrogen gas.
Fire-stink—The stench from decomposed iron pyrites.
Fitter—The person who sells coals at the shipping port; *Fitting*—the business of a fitter; *Fittage*—the expenses in selling coals.
Flang—A two-pointed pick.
Flange—Applied to a vein widening.
Flat—A horizontal vein; also, the end of the horseway, where coals are brought.
Flat-rods—Engine rods for horizontal motion.
Fleaing—Thinning the pillars of coal before abandonment.
Float ore—Waterworn particles of ore.
Flookan—Clayey matter in the veins; a vein or course of clay.
Floran tin—Tin-ore scarcely visible in the stone, or stamped very small.
Fluke—The head of the charger, used for cleansing the hole before blasting.
Fother or *Fodder*—As to lead, 19½ cwt. in London, 20 cwt. in Bristol, 21 cwt. in Newcastle-on Tyne, 22 cwt. in Stockton, 2,340 lbs. in Hull, 2,400 lbs. in Chester and Liverpool, 2,520 lbs. in Derby; as to coals, one-third of a chaldron.
Foal—A lad employed with the putters.
Foot-hook—The large hook at the bow of a waggon for drawing coal up a shaft.

Foot-wall—The wall under the vein.
Footway—The ladders for the workmen.
Forcepiece—A piece of timber put diagonally, for keeping the ground open.
Forefield—The face or extent of the workings.
Forefield end and *Forehead*—The furthest extent of the workings.
Forewinning—Advanced workings.
Fork—The bottom of the engine shaft; *water in fork*—the water all drawn out; also a piece of wood for keeping open the side of a shaft or drift.
Foulness—See *Fire-damp*.
Foundermeer—The first 32 yards of ground worked (Derbyshire).
Foundershaft—The first shaft sunk.
Furtherance—The extra price paid to hewers of coal, when required as putters.
Fuzze—Straws, reeds or hollow vegetable substances filled with powder.

G.

Gad—A pointed wedge with parabolic sides.
Gait—A journey or trip.
Gale—A grant of mining ground.
Galeage—Royalty.
Gallery—A level or drift.
Gang—A mine; also, a set of miners.
Gang-art—Side of a mine.
Gangway—A level; also, a wooden bridge.
Garland—A trough or channel round the inside of a shaft for catching water.
Gash—Applied to a vein wide above, narrow below.
Gate—A road or way underground for air, water or general passage.
Gate-road—A wide passage on the floor of the coal.
Gavelock—An iron poker or lever.
Gear—Working implements.
Gears—The trapping of a horse.
Gig—A small sump. See *Sump*.
Gin—A small engine for working shallow mines.
Ginging—Arching a shaft to prevent cattle from falling in.
Girdle—A thin bed of stone.
Glist—Mica.
Glut—Wood for filling up space in cribbing.
Goaf—Part of a mine from which all the coal has been worked.
Gobbing or *Gob*—The refuse, after extraction of coal.

Good levels—Levels nearly horizontal.
Gossan or *Gozzan*—Oxide of iron and quartz.
Grace o' God—An accidental discovery of a vein of ore.
Grain tin—Crystalline tin-ore; metallic tin smelted with charcoal.
Grass—The surface.
Griddle—A sieve.
Grinder—Machine for crushing ore between iron cylinders.
Grip—A small narrow cavity.
Groove or *Grove*—A mine.
Ground—The rock or bed in which the vein is.
Ground bailiff—The superintendent of mines.
Growan—Decomposed granite; sometimes, the granite rock.
Gubbin—A kind of ironstone.
Gudgeon—A bit of wood used for roofing a mine.
Gullet—An opening in the strata.
Gulph of ore—A large deposit of ore in a vein.
Gunnies—Levels or workings.
Gurt—A gutter.

H.

Hack—A large pick.
Hade—The inclination of a vein.
Half-marrow—One of two lads required for the work of one putter.
Halvanner—The dresser of the halvans.
Halvans—Ores much mixed with impurities.
Hand-gears—Small winding hand-cylinder for shallow work.
Hang-bench—Part of the stowses.
Hanger-on—The man who hangs the waggon at the foot of the shaft.
Hangingside or *Hanging wall* or *Hanger*—The wall or side over the vein.
Hauling—Drawing ore or refuse out of the mine.
Hazel—Freestone.
Head-sword—The water running through an adit.
Heading—The vein above the drift.
Headsman—See *Putter*.
Headtree—Timber on the roof of a level for support.
Headway—A passage driven in the direction of the grain of the coal.
Heap—The refuse at the pit's mouth.
Heapkeeper—A man charged with the cleaning of coals at the surface.

Heapstead—The height at a pit's mouth.
Heathen—Applied to bed of coal immediately below the 10 yard coal, Staffordshire.
Heave—The horizontal dislocation of one vein by another.
Hewer—A miner who cuts or works the coal: *Hewing*—working the coal.
Hitch—Dislocation of veins or strata.
Hogger—A leathern pipe for delivering water.
Hogger-pump—The uppermost pump in a sinking pit.
Hoggers—Stockings without feet.
Holing—The working of a lower part of a bed of coal for bringing down the upper mass.
Hook-handles—The handles of a windlass.
Hopper—A sluice at the foot of underground workings for regulating the contents of a waggon; also, a place of deposit for small coals.
Hoppet or *Hopper*—The Derbyshire dish.
Horn—Applied to a *line* running at an angle of forty-five degrees with the face of the coal.
Horns—Guides for the drum rope.
Horse—The dead ground between two branches of a vein near their separation.
Horse-arm—The part of a whim to which the horses are attached.
Horse-back—A part of the roof or floor intruding into the coal.
Horse-fettler—The man who has the care of the horses underground.
Horse-head—A wooden box used for ventilation.
House of water—A cavity or space filled with water.
H piece—See *Aitch piece*.
Hulk—See *Dzhu*.
Hushing—Discovery of veins by accumulation and sudden discharge of water.
Hutch—A cistern or box.

I.

Inbye or *Inbyeside*—Further into a mine.
Intake—The airway for fresh air.
Into the house—The upstroke of a pumping engine.
Irestone—Hard clay slate; hornestone; hornblende.

J.

Jackanapes—Small rollers between the rope rolls and pulleys.
Jackhead pit—A well or small shaft sunk within a mine.
Jackhead pump—The house water pump of an engine.

Jackhead staple—A small pit for the supply of fuel for the boilers.
Jack-roll—A hand windlass.
Jagging—A mode of carrying ore to the smelt-mill in bags on horseback.
Jig-chain—A chain hooked to the back of a waggon.
Jig-pin—A pin for stopping the drawing machine.
Jigger—Cleaner of ores by jigging.
Jigging—Separating the ores with a wire-bottomed sieve, the heavier particles passing through.
Jowl—A noise made by beating at each end of two drifts expected to meet.
Judd—A part of the whole coal, or a pillar or coal ready to be worked: *Trail judd*—a drift for the main judd.
Judge—A staff for measuring coal work underground.
Jumper—A long boring implement.
Junket—See *Kibble*.
Junking—A passage in a pillar of coal.

K.

Kavels—Lots cast by miners for the working places.
Kebble—Opaque calcareous spar.
Kecker—An inspector.
Keckle-Meckle—The poorest kind of lead-ore.
Keel—A large river boat.
Keeps—Movable frames or brackets of iron near the top of a shaft.
Keeve—A large vat.
Kenner—A signal for giving up working.
Kevil—A substance found in veins containing carbonate of lime, fluor and barytes.
Kibble—A bucket for drawing ore to the surface; also, a small rubbish tub.
Kibble-filler—The man sending up the produce or refuse.
Kicker—Ground left in first cutting a vein for support of its side.
Kiles—Leathern strings for chains.
Killas—Clay slate.
Kingpost—Apparatus for strengthening a beam.
Kink—To curl into knots, as ropes.
Kirving—The holding made in the bottom of the coal before blasting it.
Kit—A wooden vessel.
Kitty—A piece of straw used in blasting.
Knits—Grains of lead-ore.

Knob—A small support for the roof.
Knock-back ore—Ore mixed with barytes or kevil.
Knocking up—The calling up of miners by beating the landing waggon.
Knockings—Lead-ore with spar, as severed.
Knockstone—A stone or piece of iron for breaking lead-ore on.

L.

Laid out—Applied to a corf forfeited.
Laired—Choked with mud.
Lamb and slack—Refuse coal.
Lameskirting—Taking coal from the side of a passage to widen it.
Land-sale—Coals sold at the pit's mouth for home consumption.
Lander—The man at the mouth of the shaft who receives the bucket.
Landling—The arrival of a waggon at the surface.
Landry-box—A box at the top of a set of pumps for the delivery of water.
Lappior—The dresser of the poorer ores after the best are taken.
Laths—The boards behind the durns.
Launders—Open water conduits.
Lazy-back—The loading place for coals at the surface.
Leader—The gut of a hitch or dyke.
Leader of the lode—A small vein, part of the main vein.
Leadings—Small sparry veins in the rock.
Leap—Applied to a vein intersected and found again.
Learies—Empty places, old workings.
Leat—A watercourse.
Leath—Applied to the soft part of a vein.
Leavings—The ores left after the crop is taken.
Ledger—Applied to the lower side of a vein.
Lencheon—A shelf of thin rock caused in sinking a shaft.
Length—A certain portion of a vein when taken.
Level—A horizontal passage or drift into a mine for entering and unwatering it; in Cornwall, a gallery or drift in the vein below the adit level; also, channels for water.
Lid—See *Cap*.
Lidded.—Applied to the contracted top of a pipe vein.
Lift—A creep; a column of pumps; a broken judd.
Lifters—The beams of a stamping or crushing mill.
Limmers—The shafts by which horses draw.
Limp—An iron plate for striking the refuse from the sieve in washing ore.
Lining—Dialling.

Loading pick—A pick for clearing the worked coal.
Lobbs—Underground stairs; also, applied to a vein irregular in descent.
Loch—A cavity in a vein.
Lock-piece—A piece of timber for supporting the workings.
Lode—A mineral vein.
Lode-stoovan—An open cutting towards a vein in rising ground.
Lofting—Wood for holding up loose stones in timbering mines.
Log—See *Baby*.
Long wall—Taking all the coal at once.
Loobs—Slime containing ore.
Lost levels—Levels not horizontal.
Lot—The lord's dues.
Lough—See *Loch*.
Lowe—A light.
Lum—A chimney of an upcast pit.
Lumb—A hole at the foot of a shaft for collecting water.

M.

Machine whim—A rotary steam-engine for winding.
Maintainer—A shareholder.
Makings—The small coals hewn out in kirving.
Mallet—An implement used in boring.
Mallon or *Mallion*—A soft kevil.
Man of war—A small pillar of coal left in a critical spot; also, a principal support in thick coal workings.
Mandrell—A pick for undermining.
Marrow—A partner in working.
Maul—A large hammer.
Meat earth—The vegetable mould.
Meetings—The middle of a pit or inclined plane.
Mell—A large hammer.
Metal—In coal mines, shale.
Metal rig or *ridge*—The strata forced up by a creep.
Metal stone—Shale mixed with sandstone.
Midfeathers—Applied to a level cut from the middle of a shaft.
Mistress—A lantern closed in front, used in currents of air.
Mobby—A leathern girdle with chain and hook, worn for drawing iron-ore from low places.
Mock ore—Blende.
Moorstone—Granite.
Mothergate—The main passage in a district of workings.
Mucks—See *Smut*.
Mudds—Small nails.
Mundic—Iron pyrites.

N.

Nail—See *Needle*.
Navvy—The part of the face of an ironstone mine between two roads.
Needle—A long piece of copper or iron used for making an aperture in blasting.
Nicking—The holing made by hewers in the side of the coal.
Nickings—The small coal worked in nicking.
Nip—The effect of creeps on pillars of coal; a crush; a natural thinning of seams.
Nittings—The refuse of good ore.
Noger—See *Jumper*.
Nogs—Square bits of wood piled to support the roof of coal mines.
Noper—See *Loading pick*.

O.

O'er layer—A piece of wood for the sieve after washing the ore.
Off-putter—A man employed in shipping coal.
Off-take joint—the joint by which the bucket is fastened to the rods.
Old man—Ancient workings.
On-setter—A man who sends coal from the bottom of the pit.
Open cast—Applied to veins or beds worked at the surface.
Open work—A quarry.
Openings—The parts of coal mines between the pillars, or the pillars and ribs.
Opens—Large caverns.
Ouges—The solid rock on the side of the vein.
Out of the house—A pumping engine in the down stroke.
Outbye, Outbyeside—Nearer to the bottom of a pit.
Outcrop or *Outburst*—See *Crop*.
Outset—The height of the pit above the surface.
Overburn—See *Burden*.
Overgate—The crossing of an airway.
Overings—The top framing of a waggon.
Overman—An agent; a daily manager.
Owner's account men—Workmen paid by the day (Cornwall).

P.

Pack—To accelerate the subsidence of the ore in the process of tossing, by beating the vessel with a hammer; also, materials piled to support the roofs of coal mines.

Pair—A gang or party of men.
Pair of gears—Two upright props joined at the top for support of the roof, or for bridges or staiths.
Parcel—A heap of dressed ore ready for sale.
Parting—A small joint in coal; also, applied to a road leading from another.
Pass—An opening left for communicating with a level.
Peach—Chlorite.
Peasy—Applied to small parcels of ore that may be weighed by the hand.
Peck—A measure of 1,209 cubic inches.
Pedn cairn—A deposit of ore distant from the vein.
Pee—A bit of lead-ore; also, intersection of a vein.
Picker—A hand chisel for dzhuing.
Pikeman—A man who holes or cuts the coals.
Pinch—A lever.
Pipe—Applied to a vein when horizontal like a stratum; also, to thin irregular layers of coal.
Pitch—The limits of the ground set to tributers.
Pitch-bag—A bag used for keeping gunpowder.
Pit-eye pillar—A solid piece of coal left round the bottom of shafts.
Pit-frame—The framework carrying the pit pulley.
Pitman—A man employed to examine the lifts of pumps and the drainage (Cornwall); a working miner (coal districts).
Pitwork—The pumps and other apparatus of the engine shaft.
Placing work—Distribution of work among putters.
Plat—Ground taken for ores or refuse.
Plate-shale—A hard argillaceous bed.
Plumb—Measuring line; also, perpendicular.
Plunger—The piston of a forcing pump.
Plunger lift—The set of pipes attached to a forcing pump.
Plug-man—A man in charge of a pumping engine.
Poker—See *Picker*.
Point of the horse—The point where a vein divides into branches.
Poling—Wood used for preventing falls of earth; also, for penetrating old loose workings.
Pol-roz—The pit under a water wheel.
Pont—A long implement for drawing out timber.
Post—A stratum of stone.
Pot-growan—Decomposed granite.
Prian—Soft white clay.
Pricker—See *Needle*.
Pricker and Puller—A long sharp pointed instrument for breaking the spurns.
Pril—A piece of solid metal; the button of an assay.

Pringap—The distance between two mining possessions in Derbyshire.

Produce—The marketable ores or minerals; in Cornwall, fine copper in 100 parts of ore.

Punch—A piece of timber for supporting the roof; also, see *Pont.*

Punch-prop—A short prop for the roof.

Putter—A young man who conveys coal from the workings to the horseway.

Q.

Quarter—The fourth part of a yard.

Queere—A small cavity or fissure.

Quick—Applied to a productive vein.

R.

Race—A small thread of spar or ore.

Rachel or *Rachen*—Small fragments of rock.

Rack—An inclined frame on which the ores are washed and separated from the slime.

Racking—See *Rack.*

Rake—Applied to a vein when oblique or vertical.

Ramble—A thin shale bed on the top of a coal seam.

Random—The direction of a rake vein.

Rapper—A lever at the top of a shaft or inclined plane, for signals from the bottom.

Ratchell—Loose stones.

Rate—The sides of underground works falling.

Reed—Gorse or other vegetable tube used for a train of gunpowder in blasting.

Refining—Separating the ores.

Regulator—A frame with slides for ventilation.

Relief—A workman taking the place of another.

Renk—The average distance coals are brought from the workings.

Rests—The machinery at the top and bottom of a pit for supporting the shaft carriage in changing the tubs.

Rib—A pillar of coal left for support; a barrier of coal left between successive sides of work; the solid ore of a vein.

Ricket—See *Fang.*

Ridding—Clearing away rubbish.

Riddle—A sieve.

Ride—To ascend a pit.

Rider or *Rither*—The concrete compound matter or mineral in a vein, not ore, but the matrix of ore; called *flowery*, when adhering to the side of a vein and carrying ore.

Right running—Applied to a vein carrying ore in beds often unproductive.

Ring—A circular piece of iron used for increasing the load of a waggon; also, a channel for waste water.

Ringer—A crow-bar.

Rise—An upward working; an upthrow.

Rising—Working upwards.

Robbing—Working part of the pillars left for support.

Rodney—A rude platform near the pit's mouth for a night fire.

Roll—See *Balk*.

Rollers—Grooved iron wheels on inclined planes for supporting the rope and lessening friction.

Rolleys—Carriages for carrying the tubs underground.

Rolley-way—Underground horse road.

Roofing—Applied to a loaded waggon wedging against the top of an underground passage.

Roof work—Applied to a vein worked overhead.

Rope-roll—A cylinder for winding rope.

Round coals—Large coals.

Row—Large rough stones.

Royalty—The dues of the lessor or landlord.

Rubble—Loose stones.

Rullers—The workers of the wheelbarrows underground.

Run—The natural falling or closing together of underground works; also, the direction of a vein.

Runner—A small stream; also, a landing waggon at the surface; also, applied to accidents to the winding apparatus.

Rush—See *Reed*.

Rusty—Applied to coals discoloured by water or exposure.

S.

Sagre or *Segar clay*—Fire clay.

Scaffold—A platform within a mine for working on.

Scal—A shale or part of the earth or rock separating and falling.

Scale of air.—Air abstracted from the main current.

Scamy—Applied to freestone in thin layers, mixed with mica.

Scares—Thin layers of pyrites or spar interstratified with coal seams.

Scovan lode—A vein without oxide of iron or quartz on or near the surface.

Scouring bit—A piece of iron at the end of the boring rod for extracting rubbish.

Scraper—A piece of iron for cleaning the hole before blasting.

Screens—Boxes or inclined spouts with bars for separating small coal from large.

Scrin—A small vein.

Seam—A stratum or bed of coal or other mineral; in Cornwall, a horse load.

Sea-sale—Coals sent by shipping.

Seat—The floor of a mine.

Seg—A bend down in the middle.

Set—To fill a tub unfairly by leaving the middle hollow; also, the mouldering of coal or stone before falling.

Set-off—The part of a connecting-rod to which the bucket-rod is attached.

Sett—A grant of mining ground; also, a frame for supporting excavations.

Setters—The large coals placed by cartmen at the sides of a cart.

Settle boards—The platform at the top of a pit.

Shadd—Smooth round stones on the surface containing tin ore, and indicating a vein.

Shaft—A pit sunk from the surface; also the handle of an implement.

Shaft-walls—Pillars of coal left near the bottom of a pit.

Shake—A cavern, usually in limestone.

Shaking—Washing the ores.

Shammel—The lifting of ore or water by different persons or machines at successive heights.

Shear legs—A wooden framing.

Shears—Two long pieces of wood placed vertically over a shaft, and united at the top, for lifting or lowering materials of great length.

Sheaths—The upright framing of a waggon.

Sheave—A wheel or roller; a pulley.

Shelf—The solid rock.

Shet—The roof of a coal mine when broken down.

Sheth—Rib of a chaldron waggon.

Sheth door—A door for ventilating back workings.

Sheth of boards—A district of workings.

Shething—See *Coursing*.

Shift—The time for a miner's work in one day.

Shifter—A man who prepares the working places.

Shiver—Shale, a hard argillaceous bed.

Shoad ore—Ore washed or detached from the vein naturally, rough and not carried far.

Shoding—The tracking of boulders towards the vein or rock from which they have come.

Shooting—Blasting.

Shot—A blast.

Show—The pale blue lambent flame on the top of a common candle flame, indicating fire-damp.
Siddle—The inclination of a seam of coal.
Side-basset—A transverse direction to the line of dip in strata.
Side-laning—Making a main passage of a coal mine part of a new side of work.
Side of work—An aggregate number of excavations and pillars in the ten yard coal in Staffordshire.
Side-wavers—The loose sides of a drift or open works.
Sill—A stratum; a piece of wood laid across a drift.
Skimpings—Skimmings of the light ores in dressing.
Skip or *Skep*—A square tub or iron box for drawing coals to the surface.
Slack—Small coals.
Slag—The vitreous mass covering the fused metals in smelting.
Sled—A sledge.
Sleek—Mud brought by water.
Slide—A vein of clay intersecting and dislocating a vein vertically; also, an upright rail fixed in a shaft with corresponding grooves for steadying the cages.
Sliders—Wood for keeping shafts and drifts open.
Slimes—Mud containing ores.
Sline—Natural transverse cleavage of rock.
Slip—A dislocation, as to a vein.
Slipes—Flat iron plates for corves to slide on.
Slit—A communication between two levels.
Sliver—A thin lath within two groves or grooves for making a joint air-tight.
Slot—A bolt or fastening.
Small coal—Coals passed through a screen or grate.
Smart money—Weekly sums paid by owners to persons injured in working.
Smelting—Reducing the ores in furnaces to metals.
Smitham or *Smiddam*—Lead-ore dust.
Smut—Decomposed coal or black dust.
Snatch—A small chimney used for ventilating small works.
Snoff—The match for lighting the train in blasting.
Snore holes—The windbore holes for water.
Soards—The agitation of the bellows in smelting.
Sole—The floor of a mine; also, the bottom framing of a waggon.
Sole-tree—A piece of wood belonging to the stowses for drawing water up.
Sollar—A small platform at the end of a series of ladders.
Sough—A level for unwatering a mine.
Spalling—The breaking of the ores in the rock, for easier separation, previous to cobbing.

Span beam—The horizontal beam passing over the whim in which the upper pivot of the vertical axis moves.

Spar—Minerals, chiefly non-metallic, and more or less crystalline.

Spare—A piece of wood used as a wedge in cribbing or tubbing.

Spears—Pumping rods.

Spend—To break ground; to work away.

Spigot and faucit—A kind of pump joint.

Spindle—Part of the stowses.

Spire—See *Reed.*

Splint—Coarse grey coal.

Spout—A channel communicating from the air-head to the gate-road in the ten yard coal; also, a box for sliding coals into a ship.

Spurns—Small supports left for safety in the operation of cutting the coal.

Squat of ore—See *Bunch of ore.*

Stage—A distance travelled by horse underground, marked by lights.

Staith—An erection of wood for shipping coal.

Stalch—Wood or mineral left for support.

Stall—An opening between coal pillars in the direction of the work and the transverse openings.

Stamp—A mark on the roof or side of a mine for showing the amount of work done; also, a hole made in coal for a wedge.

Stamp-head—The iron weight connected with the stamps.

Stamper—A boring implement.

Stamps or *Stampers*—Machine for crushing the ores.

Standage—Space for standing water.

Standard—The price of fine copper (Cornwall).

Staple—A small pit.

Start—The lever of a gin.

Stays—Supports; also, piece of wood for securing the pumps in the engine shafts.

Stea—A ladder.

Stem—A day's work; also, to fill a hole with coal or stone before blasting.

Stemmer or *Stemming-hammer*—A piece of iron for putting clay into blast holes.

Stemples—Wooden steps in a mine.

Stence—Wood for supporting a roof.

Stenton or *Stenting*—A passage between two main headways.

Stickings—Thin veins of ore, or thin seams of clay in veins.

Stint—A certain quantity of work to be done.

Stone head—The rock below the alluvium.

Stook—A small block of coal left to support a headway's course.
Stooled—Applied to a vein cut vertically for some distance.
Stope—A horizontal bed; to work horizontally; also, mineral ground to be worked; also, the work at the sole of a drift; also, a hole or step for a stemple.
Stoping—Working downwards.
Stopping—A barrier of bricks or clay for turning the course of the air.
Stowing—Rubbish for filling up old works.
Straight stall—An excavation into the thick coal.
Strake—An open box of wood in which the ores are washed.
Strapping plates—The iron plates of the connecting-rods.
Stream tin—Tin ore in the form of pebbles on the surface.
Streek—A flat or dilated vein between two strata.
String—A small vein.
Strum—A cover for the end of a waterpipe.
Stuff—Refuse.
Stull—Timber placed in the backs of levels for supporting refuse. See *Back*.
Sturt—The excessive wages of a tributer on cutting a course of ore.
Styth—See *Choke damp*.
Sump—A pit sunk within the mine; also, the bottom of an engine shaft; also, a catching drain; also, the part of a judd of coal first brought down.
Sump-men—The assistants of Cornish pitmen.
Sump-shaft—The engine shaft.
Sun-cheek or *Sun-vein*—The south side or vein.
Swad—A thin bed of coal or stone below a coal seam.
Swallows or *Swallow-holes*—Natural holes on the surface caused by subsidence of rocks; also, caverns or openings where the water disappears.
Sweep—Applied to a vein branching like the segment of a circle.
Sweep-plates—Curved plates for barrow ways at a turn.

T.

Tack—A small prop of coal.
Tackle—Windlass, rope and bucket.
Tacklers—Small chains round the loaded corves.
Tail-crab—A capstan for winding the spare rope.
Tamping—The soft material placed on the gunpowder for confining its force in blasting.
Team—To load water in bowls.
Tear war—A signal for ascent from a pit.

Tee—Applied to a cross vein meeting a main vein without intersecting it.

Ten—A measure varying from 418 to 440 bolls (Winchester).

Tentale rents—The rents per ten.

Terluing—See *Dileuing*.

Thill—The floor of a coal mine.

Three trees—A kind of ladder.

Throw—Applied to a vein nearly vertical, and of regular hade.

Throwing—Breaking out the supports for the hanging coal after cutting.

Throw up or down—Applied to an intersected vein.

Thrust—See *Creep*.

Thurl or *Thyrl*—A long coal level; also, to make a breach into old works.

Ticketings—The sales of ores.

Tie—A level; also, a support for the roof in coal mines, attached to the rib.

Timber-man—The man employed in supporting the excavations.

Tipe—To upset a waggon.

Toadstone—Basaltic rock.

Tollar—The person who examines the limits of tin-ore ground periodically.

Token—Marked leather sent up by heavers of coal.

Topit—A boring tool.

Tossing or *Tozing*—The process of suspending ores by agitation in water previously to packing.

Towt—Old rope.

Trade—Refuse.

Tram—A carriage for the tubs.

Tram-road—Railroad.

Trapper—A boy who attends to the aircourses.

Treloobing—See *Tossing*.

Tribute—The portion of the ore given to the miner for his labour or its value.

Tribute pitches—The limits assigned to a party of miners.

Tributers—The miners working for tribute.

Trimmer—A man who spreads coals in the ship's hold.

Trogues—Wooden drains, like troughs.

Trouble—A dislocation of the strata.

Trow—A wooden channel for ventilation or water.

Trumpeting—A small channel cut behind the brickwork of a shaft.

Trunk—The cistern or inclined box used in separating the ore and slime; also, wooden spouts for air or water; also, boxes for raising rubbish to the surface.

Trunking—The process of separating the ore and slime before racking and tossing.
Tubbing—Iron cylinders in a shaft for keeping out the water, and causing its rise to a height.
Tubs—Boxes for conveying coal.
Tuft—A soft sandstone; also calcareous deposits.
Tugs—Hoops of iron on the corves for the tacklers.
Tummals—A heap.
Tunnel head—The top of a furnace.
Turn—See *Sump*.
Turning house—The first working on a vein after it is cut transversely.
Turn out—A short loop line of railway for the passing of waggons.
Turn-tree—A part of the drawing stowse.
Tut work—Piece work; paid per fathom.
Tuyere—The aperture for admitting air into a furnace.
Twitch—See *Check*.
Tying—Washing.

U.

Underlay—Applied to an inclined vein.
Underlayer—A vertical shaft.
Underlay shaft—A shaft sunk on the course of a vein.
Under-level drift—A drift from a pumping pit, to free dip workings from water.
Under the top—Applied to the coal left arched in bad roofs.
Upcast—Applied to a dyke, where the coal is uppermost; also, to a pit where the air ascends.

V.

Van—To cleanse ore on a shovel.
Veinstone—See *Rider*.
Vend—The whole produce of a coal mine.
Vestry—Refuse.
Vugg or *Vogle*—A cavity.

W.

Waggon hole—The place where the railway ends in a side of work.
Waling—Cleaning coals by picking out refuse.

Wall—The side of a level or drift; also, a passage underground between boards.

Walling—Applied to the roads in a mine, when made with stone.

Wash hole—A place for refuse.

Waste—A vacant place in the gobbing. See *Gobbing*; also, old workings.

Waste-man—A man charged with the ventilation.

Water blast—A kind of ventilation effected by diverting a stream of water down a shaft.

Waving—Applied to a vein opening and closing at short intervals.

Way-end—The place where the road enters the face of ironstone mines.

Weigh board—Clay intersecting a vein.

Well—The lower part of a furnace where the metal falls.

Wharr or *Wharl*—A slide for carrying corves in low drifts.

Whim or *Whimsey*—A machine for raising ores and refuse.

Whimble or *Wimble*—A hollow instrument for cleaning a hole in boring.

Whip and Derry—A bucket drawn to the surface by a horse.

Whole—Unworked mineral.

Willd lead—Blende.

Winch or *Winze*—Windlass.

Windbore—The lowest pump with holes for water.

Wind-holes—Shafts or sumps for air.

Winding engine—An engine for raising minerals and refuse.

Windway—An aircourse.

Winze—A sump or pit sunk to a vein for communicating one level with another.

Work—Undressed ores.

Working big—Large enough for a man to work in.

Workings—The excavations.

Wough—Wall of a mine.

Z.

Zawn—A cavern.

Zighyr—Applied to water slowly issuing through a crevice.

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